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SELECT CASES
AND
OTHER AUTHORITIES
ON THE
LAW OF PROPERTY.

SELECT CASES
AND
OTHER AUTHORITIES
ON THE
LAW OF PROPERTY.

BY
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VOLUME II.

SECOND EDITION.

CAMBRIDGE:
GEORGE H. KENT,
1906.

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UNIVERSITY PRESS:
JOHN WILSON AND SON, CAMBRIDGE, U.S.A.

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SELECT CASES
AND OTHER
AUTHORITIES ON THE LAW OF PROPERTY.

BOOK V.
RIGHTS IN ANOTHER'S LAND.

CHAPTER I.
PROFITS.

ANONYMOUS.
COMMON PLEAS. 1584.

[*Reported Year-Book 26 Hen. VIII. 4 pl. 15.*]

NOTE that *Hales*, Apprentice, said: "Common appendant is of common right, and so it begins at first, and it shall not be appendant except to arable land; for a man shall not have common appendant to a house, nor to any other land but arable land, and this common a man shall not have except by prescription. For a man cannot make common appendant, for it begins only before time beyond memory, and in it a man shall have sufficient common for his beasts which manure his land to which it is appendant." To which FITZ-HERBERT [J.] agreed, and said: "And it is otherwise with common appurtenant; for a man can make common appurtenant at this day, and can alienate it, and sever it from the land to which it is appurtenant, but so he cannot with common appendant." And note that it was agreed in the same case that if a manor descends to two parceners or more, and they make partition, so that each of them has part of the demesne and part of the services, each of them has a manor. *Quod nota.*

Co. Litt. 122 a. There be four kinds of common of pasture; viz., common appendant, which is of common right (and therefore a man need not prescribe for it), for beasts commonable, that is, that serve

for the maintenance of the plough, as horses and oxen to plough the land, and for kine and sheep to compester the land, and is appendant to arable land.

The second is common appurtenant, that is, for beasts not commonable; as swine, goats, and the like. If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of a common appurtenant, or of any other common of what nature soever. But both common appendant and appurtenant shall be apportioned by alienation of part of the land to which common is appendant or appurtenant; and for common appurtenant one must prescribe.

The third is *common per cause de vicinage*, which differeth from both the other commons, for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity; in which case one may enclose against the other, though it hath been so used time out of mind, for that it is but an excuse for trespass.¹

The last is common in gross, which is so called, for that it appertaineth to no land, and must be by writing or prescription. Of common appendant, appurtenant, and in gross, some be certain, that is, for a certain number of beasts; some certain by consequent, viz., for such as be levant and couchant upon the land; and some be more uncertain, as commons *sauns number* in gross, and yet the tenant of the land must common or feed there also.²

There be also divers other commons, as of estovers, of turbary, of piscary, of digging for coals, minerals, and the like. If common appendant be claimed to a manor, yet *in rei veritate* it is appendant to the demesnes, and not to the services; and therefore if a tenancy escheat, the lord shall not increase his common by reason of that. If a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custom against the law, to exclude the owner of the soil; for it is against the nature of this word common, and it was implied in the first grant, that the owner of the soil should take his reasonable profit there, as it hath been adjudged. But a man may prescribe or allege a custom to have and enjoy *solam vesturam terræ* from such a day till such a day, and hereby the owner of the soil shall be excluded to pasture or feed there; and so he may prescribe to have *separalem pasturam*, and exclude the owner of the

¹ On *common per cause de vicinage*, see several cases in 10 Q. B. 581-640.

² "Amongst the older authorities there appears, certainly, some difference of opinion as to the meaning of the expression 'levant and couchant.' There is one set of cases in which it is laid down, that the term 'cattle levant and couchant upon enclosed land' means such cattle as are actually used for the purpose of manuring and cultivating the enclosed land. The rule now is, that such cattle only are to be holden levant and couchant upon the enclosed land, as that land will keep during the winter. It has been argued, that the rule includes such as the land will keep during the whole, or any part, of the year; but that is not so. The real question is, Has this defendant

soil from feeding there.¹ *Nota diversitatem*. So a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communiam piscariæ*, or *liberam piscariam*, the owner of the soil shall fish there. And all this hath been resolved.

Co. Lrr. 164 b. The Lord Mountjoy, seised of the manor of Canford in fee, did by deed endented and inrolled bargain and sell the same to Browne in fee, in which indenture this clause was contained. Provided always, and the said Browne did covenant and grant to and with the said Lord Mountjoy, his heirs and assigns, that the Lord Mountjoy, his heirs and assigns, might dig for ore in the lands (which were great wastes) parcel of the said manor, and to dig turf also for the making of allome. And in this case three points were resolved by all the judges. First, that this did amount to a grant of an interest and inheritance to the Lord Mountjoy, to dig, &c. Secondly, that notwithstanding this grant, Browne, his heirs and assigns might dig also, and like to the case of common *sauna nomber*. Thirdly, that the Lord Mountjoy might assign his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stock; neither could the Lord Mountjoy, &c., assign his interest in any part of the waste to one or more, for that might work a prejudice and a surcharge to the tenant of the land; and therefore if such an uncertain inheritance descendeth to two coparceners, it cannot be divided between them.²

ANONYMOUS.

1569.

[Reported Dyer, 235, pl. 40.]

THE king's grantee or patentee of the herbage of a forest shall have trespass against any one who consumes or destroys the grass, but not the trees nor the fruit of them; and also shall take beasts damage-feasants there; and the writ of trespass shall be *quare clausum fregit*, as well as if it had been of land. And by the opinion of three judges in B. R. in Trin. Term, 2 H. 8 [Kellw. 159 b], the patentee may inclose the forest by such grant, &c.³

turned more cattle upon the common than the winter eatage of his ancient tenement, together with the hay and other produce obtained from it during the summer, is capable of maintaining!" Per PARKER, B., in *Whitlock v. Hutchinson*, 2 Moo. & R. 205 (1839). And see *Carr v. Lambert*, L. R. 1 Ex. 168.

¹ In *Welcome v. Upton*, 6 M. & W. 536 (1840), a right in gross by prescription in A. and his ancestors to a sole and several pasturage, was held good and assignable.

² *Funk v. Haldeman*, 53 Pa. 239, 244; *Van Rensselaer v. Radcliff*, 10 Wend. 639.

³ "And these cases were put on this ground, that a man shall have an action of trespass *vi et armis* *quare in warennam suam intravit*, notwithstanding that the freehold of the soil is in the defendant, for he does not bring an action of freehold of soil, but for

TYRRINGHAM'S CASE.

QUEEN'S BENCH. 1584.

[Reported 4 Co. 36 b.]

IN trespass between Phesant, plaintiff, and Salmon, defendant, the case was such: Tho. Tyrringham was seised of an house, 44 acres of land, 7 acres of meadow, and 2 acres of pasture, in Titchmarsh in the county of Northampton; to which house, land, meadow and pasture, he and all those whose estate he had, had used to have common of pasture for oxen, cows, and heifers levant and couchant upon the house, land, meadow, and pasture, as well in 30 acres of land in the same town (whereof one John Pickering was then seised in fee), as in 40 acres of land and pasture in Titchmarsh aforesaid (whereof one Boniface Pickering was then seised in fee) as to the said house, land, meadow, and pasture appertaining. And afterwards the said Boniface Pickering being seised as aforesaid, of the said 40 acres, purchased to him and his heirs the said house, 44 acres of land, 7 acres of meadow, and 2 acres of pasture, to which, &c., and being so seised as well of the said 40 acres in which, as of the said tenements to which, &c., demised the house, land, meadow, and pasture to which, &c., to Phesant, who put in two cows into the said 30 acres to use the said common, and the said Salmon, who was farmer of the said John Pickering, with a little dog, *leviter et moliter* drove out the said cows, and the said Phesant brought his action of trespass for chasing his cattle. In this case divers points were resolved by WRAY, C. J., SIR THOMAS GAWDY, *et totam curiam*: First,¹ . . . 2. It was resolved that common appendant may be apportioned for two reasons: 1. Because it is of common right, and therefore if the commoner purchases parcel of the land in which, &c., yet the common shall be apportioned; as if the lord purchases parcel of

the warren, with which the defendant has nothing to do. So if one grants the vesture of his land for a term of years, if the grantor, who has the freehold in the land, takes the vesture or the profit which was his [the grantee's] by reason of the grant, he shall have an action; for he does not bring the action of the land, but of the chattel. And the law is the same of a grant made of trees, and the grantee cuts them down, and the grantor takes them, a good action of trespass *quare vi et armis* lies for taking the trees, because they are his chattels. And so where one has a liberty or profit in a freehold, and he who has the freehold does an injury to this liberty or profit that he has in his land, it is right that he should be punished *vi et armis*; for he has nothing to do with them, but with his land and freehold, of which the other does not bring his action. And so as the lessee has a term, which is not now part of the defendant's freehold, it is right that he [the lessor] should be punished for entering the close, because he has given the close to another for the time, and the lessee will not use the action for the freehold. And all the cases put were held for law." *Anon.*, 5 Hen. VII. 10 (1490).

See *Wilson v. Mackreth*, 3 Burr. 1824: *Cox v. Glue*, 5 C. B. 533.

¹ The first resolution, in which it was held that the common was appurtenant, not appendant, is omitted.

the tenancy, the rent shall be apportioned ; so if A. has common appendant to 20 acres of land, and enfeoffs B. of part of the said 20 acres to which, &c., this common shall be apportioned, and B. shall have common *pro rata*. And where it was objected : 1. that the prescription fails in both the cases ; for in the first case he never had common in part of the land only, but entirely in all ; and it would be now a prejudice to the terre-tenant if he should have common in the 30 acres only for all the cattle levant and couchant upon all the tenements to which, &c. And in the latter case, no common was ever appendant to part of the land, but entirely to the whole ; also, 2. In assise of common all the terre-tenants ought to be named, and that cannot be when the commoner himself has purchased part of the land. As to these objections, it was answered and resolved, that as to the 1st, the prescrip. ought to be special, *sc.*, to prescribe to have common in the whole till such a day, and then to show the purchase of part, and from that time that he has put in his cattle into the residue *pro rata portione* ; as in the cases, when a corporation has liberties by prescription, and within time of memory the corporation is altered, there ought to be a special prescription ; as to the second case, *sc.*, when part of the land to which, &c., is aliened, there, every of them may prescribe to have common for cattle levant and couchant upon his land, and in none of these cases any prejudice accrues to the tenant of the land in which the common is to be had, for he shall not be charged with more upon the matter than he was before the severance ; and God forbid the law should not be so, when part of the land to which, &c., is aliened ; for otherwise many commons in England (which God forbid) would be annihilated and lost ; and it was agreed, that such common, which is admeasurable, shall remain after the severance of part of the land to which, &c. But in the case at bar, forasmuch as the court resolved, that the common was appurtenant and not appendant, and so against common right, it was adjudged, that by the said purchase all the common was extinct ; for in such case, common appurtenant cannot be extinct in part, and be *in esse* for part by the act of the parties. And as to the last objection, it was answered and resolved, that if upon the matter the common appendant should be apportioned, then the terre-tenant should be only named out of the land charged with the residue of the common, as in case where a rent-charge is apportioned in case of descent, the tenant of the land shall be only named out of which the residue of the rent which remains issues. And it was said, in this case, this word (*pertinens*) is Latin as well for appurtenant as for appendant, and therefore *subjecta materia*, and the circumstance of the case ought to direct the court to judge the common to be appendant, or appurtenant.¹

¹ The rest of the case is omitted.

TOTTELL v. HOWELL.

COMMON PLEAS. 1595.

[Reported Noy, 54.]

It was held by the court that *herbagium*, for years, cannot be granted without deed. Note 17 E. 4, 6.¹

DRURY v. KENT.

KING'S BENCH. 1603.

[Reported Cro. Jac. 14.]

REFLEVIN. Upon a special verdict the case was, A man prescribes to have common appurtenant to the manor of B. for all his beasts levant and couchant upon it: he grants this common to A. Whether this grant were good or no? was the question. And adjudged, that he could not grant it over, for he hath it *quasi sub modo*, viz., for the beasts levant and couchant; no more than estovers to be burnt in a house certain: but common appurtenant for beasts certain may be granted over. Wherefore it was adjudged *ut supra*.

SMITH v. GATEWOOD.

KING'S BENCH. 1607.

[Reported Cro. Jac. 152.]

TRESPASS in a place called Horsington Holms. The defendant justifies, for that Stixwold is an ancient vill adjoining to the place where, &c., and that within the said vill is, and time whereof, &c., hath been such a custom: that every inhabitant within any ancient messuage within the said vill, by reason of his commorancy therein, hath had common in the place where, for all his great beasts, at all times of the year, &c.; and so justifies as an inhabitant. And it was thereupon demurred, Whether such a prescription and usage in a vill for the inhabitants for common and matter of profit be good?

After argument at bar and bench, it was resolved, that it was not good; for inhabitants, unless they be incorporated, cannot prescribe to have profit in another's soil, but only in matters of easement, as in a

¹ See *Somerset v. Fogwell*, 5 B. & C. 875.

way or causey to church, or such like: so in matters of discharge, as to be discharged of toll, or of tithes, or *in modo decimandi*, or the like: but to have interest it cannot be; for that ought to be by persons enabled, who are always to have continuance: for if there should be such prescription, then, if any of the inhabitants depart from their ancient houses, and the house continues empty, the inheritance of the common should be suspended; which cannot be. Nor can such a common be released; for if one inhabitant should release, another which succeeded him might claim it; which is against the rules of law, that an inheritance in a profit should not be discharged: and by such prescription a maid-servant or child who resides in the house is said to be an inhabitant, and to have the benefit of the common; which would be inconvenient. Wherefore they all resolved, that such a custom alleged by way of usage (not otherwise) is not good; and adjudged it for the plaintiff. It was said to be so resolved in Trinity Term, 33 Eliz. Roll. 422, *Lawrence v. Hull*; and Coke cited, that in 19 Hen. 8, in Spelman's Reports, it was adjudged accordingly in this court. *Vide* 7 Edw. 4, pl. 26; 15 Edw. 4, pl. 29; 18 Edw. 4, pl. 3; 20 Edw. 4, pl. 10; 9 Hen. 6, pl. 62; 18 Hen. 8; pl. 1.¹

PITT v. CHICK.

COMMON PLEAS. 1620.

[*Reported Hutt. 45.*]

MATTHEW PITT brought replevin against Chick; the defendant avow, for that the place contains five acres, which lie between the lands of Sir George Speck: and that the said Sir George Speck and all his ancestors, *de temps d'out*, &c., have used to have herbage and pasture of the said five acres, viz. if they were sown, then after the reaping until re-sowing; and if they were not sown, then for the whole year, and convey title to the said herbage by lease in writing to him, and avow damage feasant.

And it was urged, that he which had all the profit for a time, and the sole profit, had the freehold; and that is not a thing which lie in prescription *semble al common*, or to pasture for a certain number of years: and it was said, that a grant *de vestura terræ*, or *de herbag. terræ* for one and twenty years, is a good lease. But it was adjudged, that it is a good avowry, and he had only profit *a prender*, and that

¹ s. c. *sub nom. Galsward's Case*, 6 Co. 59 b, where the case is said to have been in the Common Pleas.

In *Linn-Regis v. Taylor*, 3 Lev. 160 (1684), a custom for every freeman and proprietor of a ship in Linn-Regis to dig gravel for the ballast of his ships was held, by the Court of Common Pleas, to be good, "it being for the maintenance of navigation, and so *pro bono publico*."

he might have an assise, or justify for damage feasant: and he which hath the fore-crop is he which hath the freehold, 15 E. 2; Fitz., Prescription, 51. And the very case is, *temps* E. 1, Fitz. Prescription, 55; and this sole feeding might have commencement by grant, and therefore a good prescription.

Judgment for the avowant.

WILKINSON v. PROUD.

EXCHEQUER. 1843.

[Reported 11 M. & W. 83.]

CASE for an injury to the plaintiff's reversion in certain closes or parcels of land in the occupation of one Gill, as tenant thereof to the plaintiff; alleging, that without the leave or license of the plaintiff, the defendants dug and excavated divers holes and pits, and erected and fixed divers engines, gins, buildings, and posts on the said closes and parcels of land, and dug, worked, and won therein divers large quantities of coal, and carried away and converted the same, and also prostrated, subverted, and injured the crops, fences, earth, and soil of the said closes or parcels of land, and cut down certain trees growing on the same, and undermined a portion thereof, &c.

Second plea, as to the cutting, digging, excavating, and making the holes, pits, and trenches in the declaration mentioned, and erecting and fixing the engines, gins, buildings, and posts in the declaration mentioned in and upon the said closes and parcels of land, and digging, working, and winning the quantities of coal in the declaration mentioned, and drawing, carrying away, converting, and disposing of the same to their the defendants' own use, and prostrating, subverting, and injuring the crops, fences, and earth and soil in the declaration mentioned, and undermining a portion of the same closes and parcels of land in the declaration mentioned; that John Proud deceased, and all his ancestors, whose heir he was, from time whereof the memory of man is not to the contrary until the time of making the indenture hereinafter mentioned, have had, and have been used and accustomed to have, and of right ought to have had, for himself and themselves, all the coals and veins of coal in and under the said closes and parcels of land in which, &c., and full and free liberty at all times of the year to enter into and upon the said closes and parcels of land in which, &c., and to cut, dig into, and excavate the same for the purpose of searching for, mining, and winning the coals in and under the same, and to make adits, shafts, and entrances into the mines of coal and veins of coal in and under the said closes and parcels of land in which, &c., and to do all necessary acts therein and thereon for the purpose aforesaid. The plea then alleged, that by deeds of lease and release, dated the 2d

and 3d of September, 1841, the said John Proud bargained and sold the said coal, mines of coal, veins of coal, and premises to one William Richardson, and the defendants then justified the trespasses as the servants of Richardson.

The third plea was framed upon the Stat. 2 & 3 Will. 4, c. 71, § 2, and alleged, that for the full period of thirty years next before the commencement of this suit, the said John Proud, deceased, and his ancestors, whose heir he was, and the said William Richardson, that is to say, the said John Proud and his ancestors, whose heir he was, before and up to the time of making the indenture first hereinafter mentioned, and the said William Richardson from the time of making the same indenture, have actually taken and enjoyed, as of right and without interruption, all the coals and veins of coal, and mines of coal, in and under the said closes and parcels of land, and have during all that time, as of right and without interruption, at all times of the year, entered into and upon the said closes and parcels of land in which, &c., and then cut, dug into, and excavated the same for the purpose of searching for, mining, and winning the coals in and under the same, and made adits, shafts, and entrances into the said mines of coal and veins of coal in and under the same closes and parcels of land, and done all necessary acts therein and thereon for the purpose aforesaid, &c.

Special demurrer to each of these pleas, and joinder in demurrer.

The points marked for argument in the margin were as follows: As to the second plea: that all the coals, veins of coal, and mines of coal in and under the said closes in which, &c., and full and free liberty to enter upon the said closes in which, &c., to dig, &c., the same, as claimed by the defendants, are corporeal hereditaments, a title to which cannot be made by prescription. As to the third plea: that the defendants claim a corporeal hereditament, and that to such a claim the Stat. 2 & 3 Will. 4, c. 71, does not apply.

W. H. Watson, in support of the demurrer.

Martin, contra.

LORD ABINGER, C. B. I think this is clearly a prescription to land. A vein of coal is land, unless distinguished from the land by the deed of conveyance. I have little doubt that if Mr. Martin were to search the Year-Books, he would find cases to show that such a claim is contrary to law. The defendants may amend on payment of costs.

PARKE, B. This is not a claim of a prescriptive right to take coal in the plaintiff's close, but a prescription for all the strata and seams of coal lying under it, that is, for a part of the soil itself, and not for the right to get the coal, which would be the subject of a grant. Possibly the defendants may be able to amend, by pleading a seisin in fee in the strata of coal, or by prescribing for the right to take coals in the plaintiff's close. With respect to the last argument urged on behalf of the defendants, according to that a man might set up a prescriptive right

to a farm and lands, together with a right of way over an adjoining close.

ALDERSON, B., and GURNEY, B., concurred.

Leave to the defendants to amend on payment of costs, otherwise,
*Judgment for the plaintiff.*¹

RACE v. WARD.

QUEEN'S BENCH. 1855.

[*Reported 4 E. & B. 702.*]

LORD CAMPBELL, C. J.,² now delivered the judgment of the court.

The first count of the declaration is for breaking and entering the plaintiff's close in the township of Horbury, and committing various trespasses therein. The defendants justify under an immemorial custom in the said township for all the inhabitants for the time being in the said township to have the liberty and privilege to have and take water from a certain well or spring of water in the said close in which, &c., and to carry the same to their respective dwelling-houses in the said township, to be used and consumed therein for domestic purposes.

The plaintiff demurs: and it has been argued before us that the plea is bad, because it claims a right for all the inhabitants of the township to take a profit *à prendre in alieno solo*.

But we are of opinion that no such right is claimed by the alleged custom. The action is not for taking water, the property of the plaintiff; and no such action could be supported unless the water were contained in a cistern or some vessel in which he had placed it for his private use. The defendants have to answer the charge of having unlawfully broken and entered the plaintiff's close, and trampled and injured his grass growing there, &c. In doing so they certainly claim a right by immemorial custom, in all the inhabitants of the township, to take water from a spring issuing from the close, and to carry it to their dwelling-houses for domestic purposes; but this claim is made with the view of excusing the alleged trespasses in entering the close and injuring the grass, &c.

The water which they claim a right to take is not the produce of the plaintiff's close; it is not his property; it is not the subject of property. Blackstone, following other elementary writers, classes water with the elements of light and air (vol. 2, p. 14). Afterwards, having stated that a man cannot bring an action to recover possession of a pool or other piece of water, either calculating its capacity, as for so many cubical yards, or by superficial measure for twenty acres of water, he

¹ So *Caldwell v. Fulton*, 31 Pa. 475; *Mason v. Moes*, 3 So. Car. 168, *accord*.

² The opinion only is here printed; it states the pleadings sufficiently.

gives the reason: "For water is a movable, wandering thing, and must of necessity continue common by the law of nature." *Ib.* p. 18. It is not disputed that this would be so with respect to the water of a river or any open running stream. We think it is equally true as to the water of a spring, when it first issues from the ground. This is no part of the soil, like sand, or clay, or stones; nor the produce of the soil, like grass, or turves, or trees. A right to take these by custom, claimed by all the inhabitants of a district, would clearly be bad; for they all come under the category of profit à *prendre*, being part of the soil or the produce of the soil; and such a claim, which might leave nothing for the owner of the soil, is wholly inconsistent with the right of property in the soil. But the spring of water is supplied and renewed by nature; it must have flowed from a distance by an underground channel; and, when it issues from the ground, till appropriated for use, it flows onward by the law of gravitation. While it remains in the field where it issues forth, in the absence of any servitude or custom giving a right to others, the owner of the field, and he only, has a right to appropriate it; for no one else can do so without committing a trespass upon the field; but when it has left his field, he has no more power over it, or interest in it, than any other stranger.

For these reasons it has been considered that the inhabitants of a district may, by custom, have a right to go upon the soil of another to take or to use water. On examining the Year-Book, Trin. 15 Ed. 4, fol. 29 A, pl. 7, cited at the bar, it would appear that Genney, as counsel, says it would be a good prescription that all the inhabitants in such a vill have used from time immemorial to have the water in such a pond to drink, &c. Catesby, then a judge,¹ assents to this, and he likens it to a custom for all the fishermen,² inhabitants in a particular vill, to have a right to dry their nets on a particular close. There the word "prescription" is used; but there is no prescription stated in a *que* estate; and a customary right by reason of inhabitancy in a particular district is evidently described and intended.

In *Weekly v. Wildman*, 1 Ld. Raym. 407, we find certain *obiter dicta* upon this subject which are entitled to some weight. "Blen-cowe, J. Inhabitants may have a custom to have pot water, which is an interest, and not barely an easement. But Powell, J., denied that, and said that it is only an easement." Both these learned judges agree that inhabitants may have a right to enter the soil of another to take pot water; and only differ as to the name to be given to it.

¹ According to Haydn's Book of Dignities, Catesby did not become a judge till 1482 (21, 22 Ed. 4). In 15 Ed. 4 (1475-6) the judges of the Common Pleas, in which court the case in the text occurred, appear, on comparing the Year-Book with the same authority, to have been Brian, C. J., Littleton, Choke, and Neele, JJ. — R.E.P.

² "Ceo ad este admittit adire que tous les piscars en un tiel ewe," &c., "sans nř e le quel les piscars sont inhabitants en ascun ville, per que a plus fort le prescriptiō serra bon en le case al barre," which was that of a right laid in all the citizens and inhabitants of Coventry. — R.E.P.

Manning v. Wusdale, 5 A. & E. 758, appears to be an express adjudication in favor of such a custom. The first count of the declaration claimed a right in the plaintiff, as occupier of an ancient messuage within the parish of St. Ives, to wash and water his cattle in a certain pond, and also to take and use the water of the said pond for domestic purposes, for the more convenient use and enjoyment of the said messuage, at all times, at his free will and pleasure. But, in the second count, the plaintiff claimed the same right merely as an inhabitant householder of the parish. After a very learned and powerful argument from my brother Wightman, then at the bar, and counsel for the defendant, to the effect that the plaintiff claimed a profit *à prendre in alieno solo*, and that both counts were bad, Lord Denman said: "It is not consistent with ordinary language to call the taking of water a profit *à prendre*." He then (without adverting to the second count) said that at all events the declaration was good, the claim being made in respect of the plaintiff's house. Patteson, J., was proceeding to give judgment on the same ground, when, his attention being directed by the defendant's counsel to the second count, he says: "It is then necessary to decide the other question; and I am of opinion that this is not a profit *à prendre*, which must be something taken out of the soil." And now he goes on to lay down the position that "inhabitants of a parish might have a right to an easement of this sort." Williams, J., agreed that this did not appear to be a profit *à prendre*, and my brother Coleridge, who, from the questions he puts during the argument, shows that he had very deliberately considered the subject, says: "My judgment rests upon a ground which makes the difference between the two counts immaterial. I think the right claimed in each is a mere easement."

The authorities relied upon by Mr. Unthank are not inconsistent with this doctrine. His quotation from Bracton does not prove that the right to take water when flowing in its natural course is a profit *à prendre*; and the learned author of that treatise, by the words he uses immediately after, shows that he was well aware of the distinction between such water and water in a cistern, which is the subject of private property.

In *Wickham v. Hawker*, 7 M. & W. 63, the Court of Exchequer held that a "liberty, with servants or otherwise, to come into and upon" lands, "and there to hawk, hunt, fish, and fowl," is a profit *à prendre* within the Prescription Act, 2 & 3 W. 4, c. 71; but that liberty and a liberty to take water are so different that they furnish no safe analogy to guide us in this case.

In *Blawett v. Tregonning*, 3 A. & E. 554, this court held an alleged custom to be bad for all the inhabitants occupying lands in a district to enter a close and take therefrom reasonable quantities of sand which had drifted thereupon, for the purpose of manuring their lands. The reason was that the drifted sand had become part of the close, so that the claim was to take a profit *in alieno solo*; but the water to be

taken never had become part of the close ; nor was it the produce of the close.

The plaintiff's counsel lastly referred to the recent decision of the House of Lords in *Dyce v. Lady James Hay*, 1 Macqueen, 305, in which the Lord Chancellor said that neither by the law of Scotland or of England can there be a prescriptive right, in the nature of a servitude or easement, so large as to preclude the ordinary uses of property by the owner of the lands affected. But no such consequence will follow from the customary easement claimed in the present case ; and it does not interfere with the ordinary uses of the plaintiff's close so much as the custom would which was held to be valid in *Tyson v. Smith*, 6 A. & E. 745 ; 9 A. & E. 406, that, at fairs holden on the waste of a manor, every liege subject exercising the trade of a victualler might enter, at the time of the fairs, and erect a booth, and continue the same a reasonable time after the fairs, for the more convenient carrying on his calling.

As to customary rights claimed by reason of inhabitancy, the distinction has always been between a mere easement and a profit à prendre. A custom for all the inhabitants of a vill to dance on a particular close at all times of the year, at their free will, for their recreation, has been held good, this being a mere easement, *Abbot v. Weekly*, 1 Lev. 176 ; and we held, last term, that, to a declaration for breaking and entering the plaintiff's close and taking his fish, a custom pleaded for all the inhabitants of the parish to angle and catch fish in the *locus in quo* was bad, as this was a profit à prendre, and might lead to the destruction of the subject-matter to which the alleged custom applied.¹

For these reasons we think that in the present case the plea to the first count is sufficient.

There is a second count in the declaration, very informally drawn, which, when examined, appears to be likewise a count in trespass *quare clausum fregit* ; and the plea to it is substantially the same as that pleaded to the first count. We are therefore of opinion that upon the whole record there must be judgment for the defendants.

Judgment for the defendants.

Unthank, for the plaintiff.

Hugh Hill, contra.

¹ *Bland v. Lipcombe*, November 14, 1854. On demurrer to the plea justifying a trespass under the right, claimed by custom. *Honyman*, for the plaintiff ; *Joseph Brown*, for the defendant.

LORD CAMPBELL, C. J. We must act upon that salutary law which distinguishes between a mere easement and the right to take a profit. It is a good custom for all the inhabitants of a parish to dance in a particular spot, or the like ; but a custom to take as a profit what is valuable would be very injurious to the owner, and of but little benefit to the inhabitants, and is bad. Such being the settled law, we are to apply it to this case. It is clear to me that the custom claimed on this plea is to angle for, catch, and carry away the fish ; but, supposing it were limited, as Mr. Brown argues, to a claim to angle for and catch the fish, without claiming a right to carry them away, I think it would be equally destructive of the subject-matter and bad.

COLERIDGE and WIGHTMAN, JJ., concurred. *Judgment for plaintiff. — REP.*

BAILEY v. STEPHENS.

COMMON PLEAS. 1862.

[Reported 12 C. B. N. S. 91.]

THE first count of the declaration stated that the defendant, on the 1st of November, 1861, and on divers other days and times between that day and the commencement of the suit, broke and entered a certain close of land of the plaintiff called Short Cliffe Wood, enclosed by a hedge-fence, and bounded on the northwest by other lands of the plaintiff, and on the southeast by lands in the occupation of one James Emery, situate in the parish of Blagdon, in the county of Somerset; and that the defendant then felled, cut down, prostrated, and destroyed two trees of the plaintiff in the said close called Short Cliffe Wood, there then standing and growing, and took and carried away the same and converted and disposed thereof to his own use.

There was also a count for money lent, money paid, money had and received, and money found due upon accounts stated.

The defendants pleaded, — first (to the first count) not guilty; secondly, that the said close and trees were not respectively the close and trees of the plaintiff.

Third plea, — that at the time of the alleged trespass, William York was seised in his demesne as of fee of and in a certain close called Bloody Field, immediately adjoining the said close of the plaintiff, and that the said William York and all those whose estate he had, and his and their tenants, had *from time whereof the memory of man runneth not to the contrary* enjoyed the right, at their free will and pleasure, to enter by themselves and their servants upon a part or strip, to wit, a lugfall¹ of the said close of the plaintiff, adjoining the said close of the said William York, for the purpose of cutting down and carrying away, and to cut down and carry away and convert to his and their own use the trees and wood growing and being on the said strip or lugfall, as to the said close of the said William York appertaining; and that the said William York before the alleged trespass demised the said Bloody Field, with its appurtenances, to James Emery, for a term of years not yet expired, who entered into possession of the same, and was before and at the time of the alleged trespass in possession thereof under the said demise as tenant thereof to the said William York; and that the said trees in the declaration mentioned were growing and being on the said strip or lugfall, and that the alleged trespass was committed by the defendant as the servant and by the authority of the said James Emery, and on his behalf, on the said strip or lugfall, and not elsewhere in the said close of the plaintiff, in the exercise of the said right, and was a user by the said James Emery of the said right.

¹ A perch.

Fourth plea, — that the said James Emery, at the time of the alleged trespass, was possessed of the said land called Bloody Field, immediately adjoining the said close of the plaintiff as aforesaid, and that the occupiers thereof for *sixty years* before this suit enjoyed, as of right, and without interruption, the right to enter at their free will and pleasure, by themselves and their servants, into a part or strip, to wit, a lugfall, of the said close of the plaintiff, next adjoining the said land of the said James Emery, for the purpose of cutting down and carrying away, and to cut down and carry away and convert to their own use, the trees and wood growing and being in the said strip or lugfall, as to the said land of the said James Emery appertaining; that the said trees in the declaration mentioned were growing and being on the said strip or lugfall; and that the said trespass was committed by the defendant as the servant and by the authority of the said James Emery, and on his behalf, in the said strip or lugfall, and not elsewhere in the said close of the plaintiff, in the exercise of the said last-named right, and was a user by the said James Emery of the said right.

Fifth plea, — that the said James Emery, at the time of the alleged trespass, was possessed of the said land called Bloody Field immediately adjoining the said close of the plaintiff as aforesaid, and that the occupiers thereof for *thirty years* before this suit enjoyed as of right and without interruption the right to enter at their free will and pleasure, by themselves and their servants, into a part or strip, to wit, a lugfall, of the said close of the plaintiff, next adjoining the said land of the said James Emery, for the purpose of cutting down and carrying away, and to cut down and carry away and convert to their own use, the trees and wood growing and being in the said strip or lugfall, as to the said land called Bloody Field appertaining; that the said trees in the declaration mentioned were growing and being in the said strip or lugfall; and that the said alleged trespass was committed by the defendant as the servant and by the authority of the said James Emery, and on his behalf, in the said strip or lugfall, and not elsewhere in the said close of the plaintiff, in the exercise of the last-named right, and as a user by the said James Emery of the said right.

Sixth plea, — that, at the time of the alleged trespass, the said William York was seised in his demesne as of fee of and in the said close of land called Bloody Field, immediately adjoining the said close of the plaintiff as aforesaid, and long before the time of the alleged trespass, by a deed made between the then owner of the said close now of the plaintiff, and which said owner was then seised thereof in fee, and the then owner of the said land called Bloody Field, who was then seised in fee of the said last-named land, and whose estate therein the said William York at the time of the said alleged trespass had (but which deed had been lost or destroyed by accident), the said then owner of the close now of the plaintiff granted to the said then owner of the said land called Bloody Field, his heirs and assigns, the right for himself and themselves, and his and their tenants, occupiers of the

said land for the time being, at their free will and pleasure, by themselves and their servants, to enter upon a certain strip of the said close of the plaintiff, next adjoining the said close called Bloody Field, to wit, a lugfall of the said close of the plaintiff, measured from the boundary of the said two closes, for the purpose of cutting down and carrying away, and to cut down, carry away, and convert to his and their own use, the trees and wood growing and being in the said strip or lugfall, as to the said close called Bloody Field appertaining; that the said James Emery was at the time of the alleged trespass tenant to the said William York of the said close called Bloody Field, and as such tenant, and by virtue of the said grant, was entitled to the right, at his free will and pleasure, by himself and his servants, of entering into the said strip or lugfall for the purpose aforesaid, and of cutting down, carrying away, and converting to his own use the trees and wood growing and being in the said strip or lugfall; that the said trees in the declaration mentioned were growing and being in the said strip or lugfall; and that the said trespass was committed by the defendant as the servant and by the authority of the said James Emery, and on his behalf, in the said strip or lugfall, and not elsewhere in the said close of the plaintiff, in the exercise of the said last-named right, and was a user by the said James Emery of the said right.

Seventh plea, to the residue of the declaration, never indebted.

The plaintiff demurred to the third, fourth, fifth, and sixth pleas, the ground of demurrer stated in the margin being, "that the plea shows no defence to the action, and claims too large a right." Joinder.

Montague Smith, Q. C. (with whom was *Bartow*), in support of the demurrer.

Prideaux, contra.

ERLE, C. J. We are much obliged to Mr. Prideaux for the assistance he has afforded us; but, after giving the best attention I could to his able argument, I come to the conclusion that the pleas are bad, and therefore that our judgment must be for the plaintiff. The pleas set up a right in the occupiers of the close of the defendant to go upon the close of the plaintiff and to take all the wood that shall be growing there. It is a claim, therefore, of a right appurtenant to the land of the defendant, to take all the profits of the land of the plaintiff, wholly unconnected with the defendant's land; and to take that as passing with the estate of the defendant. Now, all the diligence and all the learning that Mr. Prideaux has brought to bear upon the matter have failed to enable him to produce any authority for such a right as that which the defendant here claims. The case of *Douglas v. Kendal*, Cro. Jac. 256, was a prescription for the owner of an estate to take, as appurtenant to that estate, all the thorns that should grow upon the land of the plaintiff, to be used at the house and in the tenement of the defendant; and it falls within a class of cases perfectly well known to the law, that the owner of an estate may claim, as appurtenant to that estate, a profit to be taken in the land of another, to be used upon the

land of the party claiming the profit. But that does not bear upon the present case, because this is a claim by the owners or occupiers of the defendant's close to cut down the trees on the plaintiff's land, and to sell and dispose of them at pleasure, wholly irrespective of the land of the defendant. Mr. Prideaux has further cited the case of *Sir Francis Barrington*, 8 Co. Rep. 136; *Liford's Case*, 11 Co. Rep. 46 b, and several other cases, which show that the owner of land may grant to a man and his heirs the right to take, for instance, all the wood or all the grass that shall grow upon the land of the grantor. That would be what we call a grant in gross passing to him and his heirs; and it may be construed to mean all the land or all the pasture, that is, the surface of the land; or it may be construed to be a profit à prendre, — a profit taken out of the land, and lying in grant. All the cases to which our attention was drawn as supporting the defendant's argument have been cases where the grant is in gross, to a man and his heirs, and not to a man and all who may thereafter occupy a certain close. That class of cases, therefore, can have no bearing on this. The case of *Hoskins v. Robins*, 2 Wms. Saund. 323, has been much pressed. There, there was a prescription very nearly to the effect of that claimed here; but I think the distinction which I pointed out in the course of the argument was one that is fully justified by our law: it was a claim to have the pasture by one of the customary tenants of a manor against the lord of the manor. There are many rights well known in manors, and capable of being supported, which arise entirely out of, and are dependent upon, the peculiar relation between the lord and the copyholder; but the analogy cannot be borne out between those cases and a case like this. All cases of grants are supposed to pass between the tenant in fee simple of the servient tenement and the tenant in fee simple of the dominant tenement, wholly irrespective of the rights of any other. The case of *Stanley v. White*, 14 East, 332, and other cases stand upon the reservation of a right, — the reservation of a right (construed to be a reservation of the land itself) in the trees. It is a claim of the land, not a claim, as this is prescribed, of a right as appurtenant to the estate, and yet wholly unconnected with the estate, — a right to take all the growth of a certain kind upon the land. I cannot find any authority for such a claim. The case of *Ackroyd v. Smith*, 10 C. B. 164, cited for the plaintiff, is strong to show that the owner of the dominant tenement cannot claim, as appurtenant to that tenement, a profit wholly unconnected with the enjoyment of the right of property in the dominant tenement. I therefore think the claim set up upon the present occasion is not supported by any authority, and that our judgment must be against the defendant.

WILLES, J. I am of the same opinion. With reference to the first plea, which sets up a prescriptive right, it amounts to this, that, before the time of legal memory, some one made a grant to some one else, whereby the occupiers of the defendant's close for the time being, *ad infinitum*, were to be entitled to cut all the trees growing in the close,

of which the plaintiff was in possession at the time the trespass was committed. The simple answer to that, is, that it is not an incident which can be annexed by law to the ownership, much less to the occupation, of the land. I wish to guard myself against being supposed to deny that there may be a grant by A. to B. of the right to enter and cut trees in a given close, analogous to that which one has seen in mining setts, of the right to enter and to work mines within a given area, and to take away the minerals there found, — a grant of a right to work and take minerals, unaccompanied by a grant of the mines themselves. I also wish to guard myself against being supposed to say that the interest in either of those grants cannot be assigned over, so that the assignee could not exercise it against the original grantor. It is unnecessary to express any opinion upon that. But, for all these positions, when it may become necessary to decide them, it may be well to refer to the case of *Muskett v. Hill*, 5 N. C. 694, 7 Scott, 855, where it was held that a license to search for and raise minerals, and also to carry them away and convert them to the licensee's own use, passes an interest which is capable of being assigned. In the judgment in that very important case, which appears to have received great consideration, a passage is cited from Vaughan's Reports (*Thomas v. Sorrel*, Vaughan, 351), where it is said: "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful; as, a license to go beyond the seas, to hunt in a man's park, to come into his house, — are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, — are *licenses* as to the acts of hunting and cutting down, but as to the carrying away the deer killed and tree cut down, they are *grants*." And, that such a grant to a man and his assigns carries an interest which is assignable, appears from the cases which are referred to in that judgment. But assuming such grants have been made, I apprehend it is clear they can only be made in gross. They convey an interest to the grantees, which grantees, if they wish to convey, must convey by the ordinary conveyances known to the law; and it is not because the grantee may happen to be the owner of the close at the time at which the grant is made to him, that such a conveyance may be dispensed with in favor of the person who may from time to time thereafter become the owner of the freehold of the close, or take the license of the owner of the freehold in the close. And the reason is a simple one, and it will be found in that class of cases now not often referred to, because the law depends principally upon the Statute of Henry the Eighth. I mean the case of a conveyance by which a certain incident is granted which, though beneficial to the grantee of the land so long as he remains the owner of it, and beneficial in respect of his ownership of the land, can be of no benefit to any other person. And the authorities are to this effect, that at com-

mon law, a benefit of that description went into whosoever hands the land might pass. The exception was the case of landlord and tenant, where the benefit runs, but, in the case of the freehold interest, the benefit only runs, and the burden does not, — a distinction which has been overlooked at least on one occasion. But in order to enable the assignee of the land to take advantage of such a benefit, it must be a benefit falling within the definition I have given, — a definition frequently given with reference to the question whether a covenant runs with a reservation in cases arising under the Statute of Henry the Eighth, whether it was beneficial to the land and beneficial in respect of the ownership of the land, and not beneficial to any other person. Probably a further limit may be put, namely, whether the incident was an incident of the ordinary and usual kind. With these limits, there is no doubt the benefit granted to the owner in fee of the land might pass to the owner in fee who succeeds him, either by inheritance or by grant. The occupier might well plead by way of prescription such a right, because it might have been acquired by grant; but, in respect of a matter that does not fall within that description, it is perfectly clear it cannot be made appurtenant; and, if it cannot be made appurtenant, you cannot of course prescribe a claim in respect of it, but must claim by showing there has been a conveyance of the right. This plea does not show any conveyance of the right to him, but simply shows that the tenant or occupier has the surface of the land to which it is alleged to be annexed. The law on this subject is adverted to, I observe, in the 3d edition of Gale on Easements; in the notes in pp. 10-15; and also in the case of *Welcome v. Upton*, 6 M. & W. 536, where the question arose whether the Prescription Act does or does not apply to a case of easement in gross. There is no doubt an easement in gross could not be claimed by an occupier under the Prescription Act, because under the Prescription Act, as has been pointed out already, the claim is by custom, prescription, or grant; and there is no doubt that a right could not be acquired under that Act, by twenty, thirty, or sixty years' enjoyment, according as it might be, whether an easement or a profit à prendre, except it was capable of being annexed to land within the rule I have mentioned. But the question has arisen whether it is not possible to plead a right in gross in the manner pointed out by the subsequent section, not a section giving the right, but a section giving the mode of pleading. It is perfectly clear to my mind that it cannot be so pleaded without showing something more than that the person is in possession as occupier; it must be shown that he is heir or assignee of the person to whom the right in gross has been granted. The mere fact of his being in possession does not show that. Therefore, notwithstanding the learned discussions that have taken place as to whether the right of an easement in gross may be pleaded in the form given under the Prescription Act, it is quite clear to my mind that nothing has passed affecting the right of prescription, and the fourth and fifth pleas are invalid. With respect to the sixth plea, that falls under the same

principle as the third. It speaks of an express grant, and the third plea speaks of prescription. The result is that an absurdity and an anomaly in the law is excluded by this judgment. Can any one conceive anything more absurd than that B. should purchase from A. in 1800 the right to all the trees in Black Acre, and that there should have been put into the conveyance these words, for the sake of caution, "heirs, assigns, and occupiers or tenants of A.," then in the year 1862, A. should let his close of White Acre to a tenant from year to year, and that tenant should be allowed to grant to his successor any title to cut down the trees which had been purchased by B. of his ancestors by a distinct conveyance of which he might have had no notice whatsoever? I think all the pleas are bad.

BYLES, J. I am of the same opinion. Mr. Prideaux's best plea, as it seems to me, is a plea of a lost grant, and that may be considered in this stage of the discussion as an existing grant; and the effect of it is, that at some distant period the owner of the servient tenement granted to the owner of the adjoining dominant tenement, and to his heirs and assigns, the right to cut down all the trees and wood of every description, for any purpose, to be used where he pleased; and I think the authorities adduced by Mr. Prideaux clearly bring him half-way towards the goal. They show that this is a profit à prendre, in which a man may have an inheritable estate; and my Lord Chief Justice pointed out in a very early stage of the argument what was the real difficulty. This may go to a man's heirs; but how can it go to his assigns? It is in no way connected with the enjoyment of the dominant tenement. There is really no more connection here, than if the owner of an estate in Northumberland were to grant a right of way to the owner of another estate in Kent; because, as has been stated (see the case of *Ackroyd v. Smith*), an incident of this nature cannot, even by express words in an existing deed, be connected with the estate by the mere act of the parties. It must, in addition to that, have some natural connection with the estate, as being for its benefit, or, as has been expressed, it must inhere in the estate. Therefore, if an express grant to this effect had been produced between the grantee and grantor, and going as between the heirs of the grantee and grantor, it cannot run with the estate. Lord Brougham observed, as quoted in that case, that no new incident can be connected with the estate. I own it seems to me there is a further objection to the plea of prescription, and also to the thirty years' plea and the sixty years' plea; and I agree with my Brother Willes, and I adopt his expression to the full extent, that such a claim of prescription as this is very absurd. That being so, it is unreasonable; and it is laid down that prescriptions must be reasonable. It is not enough to say it is possible to be granted. Even if this could by law be granted, I think it falls within the objection to a prescription, that it is unreasonable, and not only *ought not* to be inferred by a jury, but *cannot* be inferred in point of law, when such a right is claimed. I think, for these reasons, and I have no doubt whatever that Mr.

Prideaux has laid before us all the cases upon the subject, that all the four pleas are bad, and the first three worse than the last.

KEATING, J. All the pleas demurred to in this case speak of a claim to exercise upon the land of another a right having no reference to the occupation of the land to which the right so sought to be exercised is alleged to be attached. That seems to be, in a legal point of view, very like a contradiction in terms, and not supported by any authority; and therefore I think the pleas are bad.

Judgment for the plaintiff.

Prideaux prayed leave to amend by limiting the claim to trees, &c., to be used on the close in the occupation of the defendant.

ERLE, C. J. Upon payment of costs, the amendment may be made, within eight days; otherwise judgment.¹

HALL v. LAWRENCE.

SUPREME COURT OF RHODE ISLAND. 1852.

[*Reported 2 R. I. 218.*]

In equity. The bill prayed an injunction to restrain the defendant from obstructing or hindering the plaintiff or his tenant, or the servants or agents of such tenant, in passing and repassing over a certain path or drift-way to the shore or beach, and procuring sand, gravel, and sea-weed from said shore or beach upon or adjoining the defendant's farm, and stones (below high-water mark) thereon, and tipping sea-weed on

¹ In *Huntington v. Asher*, 96 N. Y. 604 (1884), one Hogan owned a tract of land, about seventeen acres of which were overflowed by a pond made by a dam on a stream. Hogan sold to J. H. Asher, in 1869, half an acre of his land adjoining the pond, by a deed containing the following clauses: "And the party of the first part, as incident to this conveyance, also grants and conveys to the party of the second part, his heirs and assigns, the exclusive right to take ice from the pond of the party of the first part, with the right and privilege of access for that purpose to and from the pond to the ice-house to be erected on the lot hereby conveyed. In consideration of which said grant, as aforesaid, the party of the second part hereby covenants and agrees for himself and his heirs and assigns to furnish and deliver to the party of the first part (so long as he shall continue to occupy his present residence), free of charge, all the ice which he shall require for his own family use, and also to furnish and deliver to the purchaser or purchasers of the pond and mill privilege and their heirs and assigns, free of charge, all the ice which they shall require for their own family use, so long as they continue to reside in the village of Rheinbeck." J. H. Asher erected an ice-house on the parcel conveyed, cut ice from the pond, and stored it in the ice-house. In 1870, Hogan conveyed the land on which the pond was situate to William Kelly, from whom, through a mesne conveyance, it came to the plaintiff; all the deeds conveying this land recited that the conveyance was subject to J. H. Asher's right of taking ice from the pond. In 1878 J. H. Asher conveyed his parcel, with its appurtenances, to the defendant, but making no special mention of any right to cut ice. The Court of Appeals of New York held that the right to cut ice was appurtenant to the defendant's parcel, and could be exercised by her.

the bank of said defendant's farm, as they had the right and had been accustomed to do. The bill further prayed an account of sea-weed taken by the defendant from said shore, and for damages for obstructions to the use of the way aforesaid.

The plaintiff claimed the right of way (which was a way passing over the defendant's land), and the privileges of the shore, by virtue of a certain indenture of partition and various conveyances, and by virtue of an uninterrupted user for more than twenty years. The cause coming on for hearing, it was agreed that the court, without considering the question of user, should first determine the rights of the parties under said indenture of partition, and the conveyances by which they respectively claimed title to said lands.

Said indenture of partition, dated Nov. 7, 1776, recites that Nicholas Taylor and Joseph Wanton Taylor are sons of Robert Taylor, deceased, and his devisees in common of a certain farm in Newport, containing one hundred and thirteen acres, of which farm they, by said indenture, make partition by metes and bounds, assigning the south part of said farm, containing fifty-nine acres and three quarters of an acre, to said Nicholas, and the north part, containing forty-nine acres and three quarters of an acre, to the said Joseph W. The indenture then proceeds: "And the said Joseph Wanton Taylor doth also covenant, promise, and agree that the said Nicholas Taylor, his heirs and assigns, shall have a drift-way through the meadow-land of him the said Joseph Wanton Taylor, where the path or drift-way now is, and the said Nicholas Taylor and the said Joseph Wanton Taylor do hereby agree that they, their heirs and assigns, shall and will at all times forever hereafter be at equal charge and expense in maintaining and keeping in good order the gates and lanes that are adjoining on said drift-way, and the said Nicholas Taylor doth grant free liberty of carrying away gravel and sea-weed off the beach belonging to his part of said farm, and also stones below high-water mark on said beach, to the said Joseph Wanton Taylor, his heirs and assigns, as also the liberty to tip the sea-weed on the bank on his part of said land."

By a deed dated March 12th, 1803, Joseph W. Taylor conveyed to Nicholas Taylor in fee, from the south side of the tract of land assigned to him, a tract of land containing thirty acres, describing the same, "together with all and singular the ways, waters, fences, improvements, rights, profits, privileges, and appurtenances to the same belonging or in any way appertaining, with the reversions thereof, and all the estate, right, title, claim, and demand whatever of me, the said Joseph W. Taylor, of, in, and to the same."

By deed, dated August 4th, 1812, the said Joseph W. conveyed all the residue of the land assigned to him by said indenture of partition to George Armstrong, together with all rights and privileges, &c. "And all the privileges and appurtenances which I, the grantor, now have, of taking and carrying away gravel and sea-weed off the beach belonging to Nicholas Taylor, and all stones below high-water mark on said

beach, and also to tip the sea-weed on the bank of the said Nicholas Taylor's land."

By deed dated July 31st, 1813, Nicholas Taylor mortgaged to the President, Directors, and Company of the Bank of Rhode Island the tract of land of thirty acres which he had purchased in March, 1803, of Joseph W. Taylor, describing the same by metes and bounds, and as "the same estate which I purchased of my brother, the said Joseph W. Taylor—To have and to hold the said granted and bargained premises, with all the appurtenances, privileges, and commodities to the same belonging, &c." And, March 19th, 1819, the mortgagees were let into possession of the premises under their mortgage, as provided by the Statute, and held the same down to 1822. On January 4th, 1822, the said mortgagees transferred to the said George Armstrong their mortgage deed and all their right, title, &c., which they had in and to the lands therein described and thereby pledged and mortgaged, subject to the equity of redemption therein of said Nicholas and the right of dower of his wife.

By deed dated July 4th, 1835, the said George Armstrong conveyed to the plaintiff, David P. Hall, the above-named lot of land of thirty acres, and the lot of land of nineteen and three quarters acres, which he purchased of Joseph W. Taylor, being the whole of the land of forty-nine and three quarters acres, assigned to the said Joseph W. under the indenture of partition between him and said Nicholas—"To have and to hold the said granted premises, with all the appurtenances, privileges, and commodities to the same belonging or in any way appertaining."

The defendant deduced his title as follows:—

By deed dated September 5th, 1808, the said Nicholas Taylor mortgaged to Elisha Coggeshall the said fifty-nine and three quarters acres, set off to him by the aforesaid indenture of partition, and on March 7th, 1818, the executor of said Elisha took possession of said premises, by virtue of a writ of possession, and, February 12th, 1835, the administrator *de bonis non* of the estate of said Elisha conveyed to the aforesaid George Armstrong, and to one John Wilbour, all the right, title, and interest of said Elisha in the aforesaid premises, and assigned to them the mortgage thereof, and the judgment of court rendered for possession of said premises.

By deed dated January 7th, 1836, the said George Armstrong granted, released, and quit-claimed all his right, title, and interest in and to the said Nicholas Taylor farm to the said John Wilbour.

By deed dated September 5th, 1836, the said John Wilbour (his wife relinquishing dower) conveyed to the defendant, William Beach Lawrence, the whole of the said Nicholas Taylor farm in fee. And the deed contained the following reservation: "Also saving and excepting a right which the proprietor of the adjoining farm has to take, carry away, and tip sea-weed, and to carry away stones from below high-water mark from the south shore of said farm, and any claim which George Arm-

strong may have personally, by virtue of an agreement heretofore entered into between myself and said Armstrong, and said Armstrong's subsequent deed, to use of one half of the afore-described premises."

The agreement above referred to was an agreement dated February 17th, 1835, between said Wilbour and Armstrong, by which said Armstrong agreed that he would not, within six years, sell his undivided half of the Nicholas Taylor farm to any one except said Wilbour, and that Wilbour should at any time within six years have the right to purchase the same, upon paying the sum which said Armstrong paid for the same; and it was agreed, "if said Wilbour shall purchase as aforesaid, the said Armstrong, his heirs and assigns forever, shall have an equal privilege to get sea-weed on the east and south shores of said farm, — that is, the said Armstrong, his heirs and assigns, to get the sea-weed one week at the east shore, and in that week the said Wilbour, his heirs and assigns, to get sea-weed at the south shore," and the next week *vice versa*, and so alternately; "the said Armstrong, his heirs and assigns, to have the privilege of tipping up sea-weed on the bank of the east shore, the said Wilbour, his heirs and assigns, to forever have a right of way for carting, &c., from said farm as follows: to keep the drift-way towards said Armstrong's house until it comes into the way leading into town. It is also agreed that said Armstrong, his heirs and assigns, when getting sea-weed, is to keep the way or path westerly to meet the old path generally used from the east shore."

It further appeared that the plaintiff, on the 14th of October, 1843, conveyed the said Joseph W. Taylor farm to one Thomas R. Martin, who, on the 27th of October, 1847, reconveyed the same to the plaintiff; and that on the 18th of September, 1850, the plaintiff conveyed to Robert H. Ives about nine and a quarter acres of said farm, being part of the nineteen and three quarters acres retained by Joseph W. Taylor when he made the conveyance of March 12, 1808, to Nicholas, but by said deed expressly reserved the said privileges of sand, gravel, and sea-weed upon the south shore of the said Taylor farm, and of tipping the sea-weed on the bank thereof, as appurtenant to the residue of the said Joseph W. Taylor farm, retained by the plaintiff.

Carpenter and Turner, for the plaintiff.

Ames, for respondent.

BRATTON, J., delivered the opinion of the court.

The plaintiff claims in this case a right to enter upon the land of the defendant, being the farm set off to Nicholas Taylor in the deed of partition of 1776, and to take and carry away from the shore thereof, mentioned in the deed of partition, sea-weed, gravel, and stone in any quantity without limit at his will and pleasure, and to make merchandise thereof for his profit, and a right of way to pass and repass to and from said shore over the defendant's land for that purpose.

This right he claims as a right in gross, though, by the deed of partition, he claims that it was originally made appurtenant to the north farm set off in said deed to Joseph W. Taylor, under whom he claims.

The arguments both for the plaintiff and defendant proceed upon the assumption that the right of taking sea-weed, gravel, and stone, whatever it was, was originally appurtenant to the estate of Joseph W. Taylor; and, indeed, if it were not appurtenant, it is evident the plaintiff has no title, for his deed from Armstrong describes no such right, and unless it was appurtenant at the time, he takes nothing by his deed.

In order to ascertain what the rights of the plaintiff now are, it is necessary to inquire, first, what were the rights originally granted in said deed to Joseph W. Taylor.

By the terms of the deed, after setting off to Nicholas the south part of the original farm, upon which portion was all the beach, and setting off to Joseph the north part, which was less in quantity, and we may presume, without a beach privilege, less in value, the deed then proceeds and says: "And the said Nicholas Taylor doth grant free liberty of carrying away gravel and sea-weed off the beach, belonging to his part of said farm, and, also, stones below high-water mark on said beach, to the said Joseph W. Taylor, his heirs and assigns, and, also, liberty to tip the sea-weed on the bank on his part of said land."

This grant is made doubtless to equalize the partition, to render the north part (which had no shore where sand and sea-weed might be obtained for improving and fertilizing the land, and it may be less facilities for obtaining stone for building and fencing) equal in value with the south part.

It will be seen, also, that the grant is not limited in terms as to quantity, nor is it defined in terms to what uses it shall be applied, or for what purposes taken, so as to furnish a just measure of the amount which Joseph might take.

We must, however, presume that it is not to be entirely without limit, extending to the entire quantity of gravel, sea-weed, or stone upon the shore, and thereby excluding Nicholas; but that the right of Joseph, was to be a right in common with Nicholas. So it must have been the intent of the parties, that, as the right was created for the benefit of the north shore, and as it must have some limit as to the amount, it should be limited in extent to the uses of the land set off to Joseph, and so it must necessarily become appurtenant; Joseph would not, however, be confined to so much only as might be necessary of necessity to the estate, but as the grant was liberal—"free liberty"—might take so much as he might have occasion to use for any purpose upon the estate.

The plaintiff's counsel contends that under this grant, upon a just construction of it, Joseph originally had a right to take for sale and profit, without regard to any use; and the case of *Phillips v. Rhodes*, 7 Met. 322, is cited to that point, in which it is held, that under a right of common to take sea-weed appurtenant to the estate and intended for a dressing for the land, it might when taken be applied to that use or sold. No reason is given, nor authority cited, and we are left upon the authority of the case alone. It is not easy to perceive the reason, if

the extent of the right were to be measured by the use and purposes of the estate. But without determining whether when once taken for use, the party might not forego the benefit of it to his estate and sell to another, the conclusion we think is warranted that the sale would not give him a right to take more than reasonably he might have taken had he thought fit to use it upon the estate.

The effect of the grant in the deed of partition is to create a right of common for sea-weed, gravel and stone, in favor of the north farm set off to Joseph, and as appurtenant thereto, to be exercised on the shore of the estate set off to Nicholas, giving a right to take so much as the owner of the north shore might think proper or profitable to use on the estate.

There passed also, as incident to this grant, a right of passing and repassing to and from the shore over the land of Nicholas, in some convenient place for the purpose of taking the profit. This was necessary to the enjoyment of the right of common granted, and would therefore pass by an implied grant, and accompany and follow the principal grant so long as it existed, and only become extinguished with the extinction of the common itself.

So also a grant of land, over which the grantor has a way of necessity to him for the enjoyment of another estate, does not extinguish the way, but the way is by implication reserved.

This right of way incident to the right of common falls under the head of secondary easements; and the objection raised, that it was not appurtenant to the north farm, and would not pass under the term "appurtenance," is not tenable.

Did these rights pass to the plaintiff? George Armstrong, by his deed of July 4th, 1835, conveyed to the plaintiff all the land originally set off to Joseph W. Taylor in the deed of partition of 1776, with the appurtenances; and whatever rights of common were then appurtenant to the lands conveyed, or to any portion of them, passed to the plaintiff. Our inquiry then must be directed to the title which Armstrong had to the common.

Armstrong's title to the land is derived to him by two separate conveyances. By the deed from Joseph W. Taylor, of August 12, 1813 [4, 1812], he acquired title to nineteen and three quarters acres, a portion of the land originally set off to Joseph, "and all the privileges and appurtenances which I, the grantor, now have of taking and carrying away gravel and sea-weed and all stones below high-water mark on said beach, and also to tip the sea-weed on the beach of the said Nicholas Taylor's land." Such are the words of the grant.

But whether any right of common then remained appurtenant to the nineteen and three quarters acres, must depend upon the effect which is to be given to the conveyance of Joseph W. Taylor to his brother Nicholas, of March 12, 1803. By that deed Joseph conveyed to Nicholas thirty acres, part of the share set off to him, to which the whole right of common was made appurtenant.

The defendant's counsel claims that the effect of the conveyance of the thirty acres portion of the dominant estate is the extinguishment of the whole common.

The first question here raised is whether this right of common was divisible, and might or not be apportioned to the several parts of the dominant estate upon a severance of the estate. In regard to rights of common which by law are indivisible, a conveyance of any portion of the dominant estate will extinguish the whole, as in the case of common of estovers, *Van Rensselaer v. Radcliff*, 10 Wend. 639; *Livingston v. Ketchum*, 1 Barb. S. C. R. 592; and the reason assigned is that the service is entire and appurtenant to an entire estate, and not being divisible, it cannot be appurtenant to part of the estate as an entire service.

There are, however, other rights of common which are in law divisible; and in all such cases it may be apportioned to the several parts of the dominant estate upon its severance by different conveyances. A right of pasture for cattle *sans nombre* is of this kind. In such case it is held that though the right be unlimited in terms, yet it is intended for the use of the estate and limited to such cattle as may be kept upon the dominant estate or upon any portion of it, and equally upon any portion, so that upon a division of the dominant estate and upon apportionment of the service to the several parts, the servient estate is not charged to any greater extent than before or with more cattle. And the rule is that wherever the common is admeasurable, the common is apportionable. *Tyrringham's Case*, 4 Co. 35. But the right, being measured by the uses of the estate, cannot be severed from the estate and granted over. *Drury v. Kent*, Cro. J. 15.

The right in the present case is of the same nature. It is intended for the use of the estate and for every acre of it, and that equally; and whether the right be divided or not, the measure is the same. It may therefore be divided, and, by a conveyance of a part of the dominant estate, it would be apportioned to the part conveyed, and so much might well pass with it under the term "appurtenance."

This conveyance may be affected by another rule, for though the common may be in its nature divisible and apportionable, yet, if the effect of the conveyance is to surcharge the servient estate, it shall not only not be apportioned, but shall become extinct for the whole.

And for the same reason it is, that a release of a portion of the servient estate or purchase of part of the servient by the sole owner of the dominant shall extinguish. In *Rotherham v. Green*, Cro. E. 593, there was a release of part of the land in which, &c. In *Kimpton v. Belamy*, Leonard, 43, the owner of the dominant purchased two acres of forty of the servient estate. In these cases the effect was to surcharge the residue. So, in *Tyrringham's Case*, 4 Co. 35.

In *Wild's Case*, 8 Co. 156, there was a conveyance of five acres of the forty contained in the dominant, and on the same reasoning it was held that the servient estate was no more chargeable upon the sever-

ance of the dominant estate than before, for that the five acres were entitled to common for the cattle levant and couchant thereon as before, and for no more.

And the rule deducible from all the cases is, as before stated, that if the effect of the conveyance is to surcharge the common, and burden to a greater extent the servient estate, it shall extinguish; if otherwise, there shall be an apportionment, and such portion will pass as appurtenant.

By this rule the portion of common belonging to the thirty acres would become severed from the residue, which would remain appurtenant to the nineteen and three quarters acres retained by Joseph Taylor, and the thirty acres would become a distinct dominant estate.

But inasmuch as the title to the dominant estate, by virtue of the conveyance, became united in the hands of Nicholas with the servient estate, all the common appurtenant to the thirty acres thereby became extinguished by unity of title. It has not been revived by any of the conveyances so as to pass by the term "appurtenance" in the deed of Armstrong to the plaintiff.

The defendant's counsel claims that, although such would be the effect of the deed to a stranger, who immediately conveys to the servient owner, yet, if made directly to the servient owner, the whole is extinguished.

Now, bearing in mind the reasoning on the cases generally upon the subject, and the rules deducible from them, we should not expect to find a case in which it should be held that, where the conveyance does not directly surcharge the common remaining, and where the servient owner can in nowise suffer injury, the whole common should become extinguished, and that against the apparent intent of the parties, but that effect would be given in such case to the clear intent.

There is, however, in *Tyrringham's Case*, the announcement of such a rule as the defendant's counsel claims. It is this: that common appurtenant cannot be extinct in part and *in esse* for part by act of the parties, for that common appurtenant was against common right. Taken in the broad sense which counsel gives it, and independent of the connection in which it is used, it might support the ground which the counsel assumes. But taken with its connection, it is evident that it was not applied, or intended to apply, to such a case as is now before us. The same rule exists in relation to rent-charge, which is said to be against common right as distinguished from rent-service, which is deemed of common right.

The only American case cited upon this point is that of *Livingston v. Ten Broeck*, 16 Johns. 14; and as this is claimed to conclude this point, it will be necessary to examine it with a little particularity.

The statement of the case shows that a certain estate, called the Vosburg farm, was entitled to common in a large pasture within the manor of Livingston, and that Henry Livingston was sole owner of fifty acres of land, parcel of the tract in which common was to be

taken ; but as it did not appear whether or not the conveyance to Henry Livingston comprehended a portion of the Vosburg farm, a new trial was necessary, and Mr. Justice Spencer, who delivered the opinion thereupon, says he does not see how the question can now be raised ; but, in view of a new trial, it is proper that the court should express an opinion, and he proceeds to give it. He then deduces the general rule, and says the governing principle is, that injustice shall not be done to the servient estate ; and if it shall be found that Henry Livingston purchased part of the Vosburg farm (which was the dominant estate, he being owner of a *portion only* of the servient), the whole common should be extinguished, because he is then interested in discharging his own land, and surcharging the residue.

There is nothing in the case, or in the opinion delivered, which indicates any intention in the court to go beyond the *Case of Tyrringham*. The whole opinion is based upon that case, which, as Justice Spencer remarks, was affirmed for good law in *Wild's Case*, and had never been overruled.

Now *Tyrringham's Case*, when carefully examined, it will be seen, does not come up to the point made by the defendant's counsel. That was a case involving the same principles as that of *Livingston v. Ten Broeck*. It was this : Boniface Pickering was the owner of forty acres, part of a tract of seventy acres, which constituted the servient estate (the residue, thirty acres, being owned by one John Pickering). He purchased the whole of the dominant estate. It was resolved "that when part of the land to which, &c., is aliened, then every of them may prescribe to have common for cattle levant and couchant upon the land ; and in none of these cases any prejudice accrues to the tenant of the land in which, &c., for he shall not be charged with more upon the matter than before the severance ; and God forbid" (say the court) "the law should not be so, when part of the land to which, &c., is aliened, for otherwise, many commons in England would be extinguished and lost." And it was agreed that such common as is admeasurable shall remain after severance of part of the land to which, &c. But inasmuch as the court resolved that the common was appurtenant, and not appendant, and so against common right, it was adjudged that by the said purchase the common was extinct ; (and the reason) "for in such case common appurtenant cannot be extinct in part and *in esse* for part by act of the parties." Now, the case was ; the owner of part of the servient became owner of the whole dominant, and so interested in surcharging the residue of the servient.

But, in order fully to understand the case and the point immediately before the court, it must be borne in mind that so far as the severance and apportionment of the common to the dominant estate is concerned, there is no difference in the rule of law applicable to common appurtenant or common appendant. In either case, upon severance of the dominant estate the common was apportionable. The difference between the two related to the servient estate, and the court in a pre-

ceding part of the case had resolved that common appendant, being of common right, might not only be apportioned to the land to which, &c., but would also be apportioned upon the severance of the estate in which, &c.; and they say, that as to this kind of common, if the commoner aliene part the land in which, &c., yet the common shall be apportioned. But it was not so with common appurtenant. In such case there could be no apportionment to the servient estate. And, therefore, the court were obliged to say, referring particularly to the part of the case before them, that by this purchase the common was extinct for the whole, for in such case common appurtenant could not be extinct in part and *in esse* for part by act of the parties.

There never was any difficulty in releasing a portion of the service charged upon the servient estate. The only difficulty was in releasing any portion of the servient estate wholly from all service, and that, because it could not be apportioned.

The points resolved in *Tyrringham's Case* might then well be affirmed for good law as they were in *Wild's Case*, where it is said: "It was well agreed that common appendant was of common right severable; and although the commoner in such case purchase parcel of the land in which, &c., yet the common shall be apportioned; but in such case common appurtenant and not appendant by purchase of parcel of the land in which, &c., is extinct, for the causes and reasons given in *Tyrringham's Case*;" and as a further reason: "It was folly for the commoner to intermeddle with part of the land in which, &c., which belonged not to him; but when he intermeddled but only with his own land by alienation thereof, it shall not turn to his prejudice, for that it is not against any rule of law, as the other case."

The agreement entered into between Armstrong and Wilbour, July [Feb.] 17, 1835, which was referred to as affecting this right, we do not see has any effect to vary the rights of the parties in this respect. That agreement is intended to create a new right in the contingency that Wilbour should purchase the right of his co-tenants. There was no conveyance of any lands to which it could be appurtenant by implication, and it is not expressly made appurtenant to any. It must have been when it came *in esse* a right in gross, and, had it been intended to be appurtenant, it was not *in esse* at the time of Armstrong's conveyance to the plaintiff, so as to pass by the deed.

Neither can the exception in the covenant of warranty made by Wilbour in his conveyance to the defendant vary those rights. There was a right of common in the estate conveyed, appurtenant to the nineteen and three quarters acres, and he excepts, — "a right which the owner of the adjoining farm has;" and his exception was equally necessary to his protection, whether the right were appurtenant to the whole farm, or to the smallest portion of it only. It is a recognition of such right to some extent, and is sufficiently answered by the smallest extent.

We are then, upon the whole, of the opinion that the deed from Joseph W. Taylor to Nicholas Taylor of the thirty acres operated as

a severance and apportionment of the common, and that the part apportioned to the thirty acres became extinguished and lost; but that the conveyance did not operate to extinguish the residue of the common apportionable to the nineteen and three quarters acres, and that so much passed by Armstrong's deed of July 4th, 1835, to the plaintiff, with a right of way as incident to it and necessary to the enjoyment.

Had the plaintiff remained owner of the whole of this lot of nineteen and three quarters acres, he would still have been entitled to the common appurtenant. But his right has again been affected by his conveyance to Robert H. Ives of nine and three quarters acres, part of the nineteen and three quarters acres. Had he made no reservation of the common in that deed, there would have been an apportionment, and Ives would have taken the portion belonging to nine and three quarters acres; for though such common may be apportioned, it could not be severed from the estate and granted over, *Drury v. Kent*, Cro. J. 15, and, because it could not be severed, the plaintiff could not retain it to himself. If it exist at all, it must exist with the estate, the uses of which it is to attend and minister to.

The plaintiff, then, at the time of filing his bill in this case, had a right of common to take from the shore of the defendant's estate seaweed and gravel, and stones below high-water mark, at all times at his will and pleasure, for such purposes as he might think proper to use them upon his estate; but this right did not extend to the thirty acres to which Armstrong derived title under the mortgage of Nicholas Fry [Taylor] to the Bank of Rhode Island, all right being extinguished as to that, but was limited to that portion of the nineteen and three quarters acres conveyed by Joseph W. Taylor to Armstrong, by deed of August 12, 1813 [4, 1812], which the plaintiff has not conveyed to Robert H. Ives; and he had also a right of way to and from his said land to the shore for the purpose of exercising this right as incident and necessary to its enjoyment.

This is the extent of his right in our view upon the deeds and conveyances put before us.

CHAPTER II.

NATURAL RIGHTS.

SECTION I.

AIR.

MORLEY v. PRAGNEL.

KING'S BENCH. 1638.

[Reported Cro. Car. 510.]

ACTION on the case. Whereas the plaintiff is owner of a common inn in Eastgestock, that the defendant maliciously erected a tallow-furnace, and boiled therein much stinking tallow, to the great annoyance of him and his guests; and by reason of such stench, arising thereupon, many of his guests left his house, and many of his family became unhealthful. Upon not guilty pleaded, a verdict was found for the plaintiff.

Germyn, Serjt., moved in arrest of judgment, that an action lies not, for he, being a tallow-chandler, ought to use his trade, which cannot be said to be a nuisance.

By all the court held, that as the declaration is penned, the action is maintainable; for every one ought *sic uti suo, quod alienum non lædat*: then when the plaintiff is an innkeeper, the defendant erecting a tallow-furnace annoyed his house with stench, especially by boiling stinking stuff: and so in *Tohayles's Case*, who erected a tallow-furnace across the street of Denmark-house in the Strand, it was found a nuisance upon the indictment, and adjudged to be removed. Whereupon judgment was here given for the plaintiff.

BLISS v. HALL.

COMMON PLEAS. 1838.

[Reported 4 Bing. N. C. 183.]

THE declaration stated that the defendant wrongfully and injuriously exercised and carried on in and upon the messuages of the defendant, being contiguous and near to the messuage of the plaintiff, the trade or business of a candle-maker or manufacturer of candles; and did then and there, to wit, on, &c., in and upon the said messuages of the

defendant, wrongfully and injuriously melt and prepare, and caused to be melted and prepared for the making and manufacturing of candles, divers large quantities of grease and tallow; and did then and there, to wit, on, &c., in and upon the said messuages of the defendant, wrongfully and injuriously make and manufacture, and cause and procure to be made and manufactured, divers large quantities of candles; by means of which several premises, divers noisome, noxious, and offensive vapors, fumes, smells, and stench, on the several days and times aforesaid, arose, issued, and proceeded from the said messuages of the defendant, and spread and diffused themselves over and upon and into and through and about the said messuage of the plaintiff; and the air in, over, through, and about the same was thereby then greatly filled and impregnated with the same noisome, noxious, and offensive vapors, fumes, smells, and stench, and was then rendered and from thence hitherto had been, and still is, greatly corrupted, offensive, disgusting, unwholesome, and uncomfortable.

Plea, That the defendant was possessed of his said messuages for a long space of time, to wit, for the space of three years next before the plaintiff became possessed of his said messuage in the declaration mentioned, and before the plaintiff occupied, inhabited, and dwelt in the same; and that before and at the time when the defendant first became and was possessed of his said messuages, the said furnaces and stoves in the introductory part of this plea mentioned had been and then were erected, set up, and placed in and upon the same; that the defendant always, to wit, from the time at which he became so possessed of his said messuages, until and at and after the plaintiff so became possessed of his said messuage as in the declaration mentioned, and thence hitherto, had used, exercised, and carried on the said trade and business of a candle-maker, and had occasioned — the phenomena described in the declaration (enumerating them as above) — in the same manner and form, and degree, and to the same extent, and at the same hours, and times, and seasons, as at the said time when, &c., in the declaration and in the introductory part of this plea mentioned; and the same during all that time, and at the said time when, &c., were and still are requisite and necessary to enable the defendant to carry on his said trade and business, in and upon his said premises, in the same manner and form, and to the same extent, as the defendant carried on the same at the time when the plaintiff came to his said premises in the declaration mentioned, near and adjoining to the premises and business of the defendant, so carried on as aforesaid; that the defendant lawfully enjoyed his said premises, manufactory, and business, before the plaintiff came to, occupied, or was possessed of his said premises in the declaration mentioned, in the same condition, extent, manner, and form, as he enjoyed and possessed the same at the said time when, &c., in the declaration mentioned, and of right ought still lawfully to enjoy the same without interruption or suit of the plaintiff; and that, the defendant was ready to verify.

Demurrer and joinder.

Butt, in support of the demurrer.

Hoggins, contra.

TINDAL, C. J. In this case the declaration alleges that the defendant injuriously carried on, in messuages contiguous to the messuage of the plaintiff, the trade and business of a candle-maker, by which noxious vapors and smells proceeded from the messuage of the defendant and diffused themselves over the messuage of the plaintiff; and all that the defendant says in answer, is, that he carried on the business for three years before the plaintiff became possessed of the messuage he inhabits. That is no answer to the complaint in the declaration; for the plaintiff came to the house he occupies with all the rights which the common law affords, and one of them is, a right to wholesome air. Unless the defendant shows a prescriptive right to carry on his business in the particular place, the plaintiff is entitled to judgment.

PARK, J. In *Elliotson v. Feetham* [2 Bing. N. C. 134], the court said that the defendant should at least have alleged a holding of twenty years' duration: here he does not go beyond three.

VAUGHAN, J. The smells and noises of which the plaintiff complains are not hallowed by prescription, and under this plea the defendant cannot justify their continuance.

BOSANQUET, J. I am of the same opinion. The defendant has, *prima facie*, a right to enjoy his property in a way not injurious to his neighbor; but here on his own showing the business he carries on is offensive, and he makes out no title to persist in the annoyance.

*Judgment for the plaintiff.*¹

¹ "There is a very marked distinction to be observed in reason and equity between the case of a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in proximity to it, and that of a new erection threatened in such a vicinity. Carrying on an offensive trade for any number of years in a place remote from buildings and public roads, does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which and travellers upon which it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residences of the citizens. This, public policy, as well as the health and comfort of the population of the city, demand. It certainly ought to be a much clearer case, however, to justify a court of equity in stretching forth the strong arm of injunction to compel a man to remove an establishment in which he has invested his capital and been carrying on business for a long period of time, from that of one who comes into a neighborhood proposing to establish such a business for the first time, and who is met at the threshold of his enterprise by a remonstrance and notice that if he persists in his purpose, application will be made to a court of equity to prevent him." SHARSWOOD, J., in *Wier's Appeal*, 74 Pa. 230, 241.

BAMFORD v. TURNLEY.

EXCHEQUER CHAMBER. 1862.]

[Reported 3 B. & S. 62.]

THE first count of the declaration stated that the plaintiff was possessed of a messuage and dwelling-house and premises, with the appurtenances, situate at Norwood, in the county of Surrey, in which he dwelt, with his family and servants: and that the defendant, contriving and intending to injure and annoy the plaintiff, erected and made certain brick-kilns upon certain land of the defendant adjoining and near to the messuage and dwelling-house and premises of the plaintiff, and wrongfully and injuriously burned a large quantity of bricks in the brick-kilns, and caused noxious and unwholesome vapors, smokes, fumes, stinks, and stenches to rise and proceed from the brick-kilns, and to enter in, spread and diffuse themselves over, upon, into, through, and about the messuage and dwelling-house and premises of the plaintiff, and the air over, through, and about the same was thereby greatly impregnated and filled with the said noxious and unwholesome vapors, fumes, stinks, and stenches, and was rendered and became and was corrupted, offensive, unwholesome, unhealthy, and uncomfortable; and thereby the plaintiff had been greatly annoyed and inconvenienced in the possession and enjoyment of his messuage and dwelling-house, and also, by means of the corrupt, unwholesome, and unhealthy state of the air in and over and about the plaintiff's dwelling-house so occasioned, the plaintiff and his family and servants became and were sick and ill, and so continued for a long time, and the plaintiff had necessarily incurred a great expense in and about obtaining necessary medical advice, and was otherwise greatly injured and prejudiced.

The second count of the declaration complained of a similar nuisance by the defendant's placing a quantity of decomposed ashes and bones in the immediate neighborhood of the plaintiff's house.

The only material plea to both counts was Not guilty, upon which issue was joined.

On the trial, before *Cockburn*, C. J., at the Summer Assizes at Guildford, 1860, it appeared that in the month of June, 1857, some land at Norwood, part of the Beulah Spa Estate, was offered for sale in lots by public auction, in accordance with certain printed particulars and conditions of sale. The particulars were headed "Particulars of the first section of the Beulah Spa Estate, consisting of about fifty acres of Freehold Building Land, &c., in nineteen lots," and stated, among other things, that the property presented "splendid sites for the erection of first class villas;" and it was added, "There is abundance of brick earth and gravel, which, combined with all the other advantages appertaining to this exceedingly beautiful property, present an unusually advantageous opportunity of carrying out safe and profitable building

operations." Captain Edward Strode, the brother-in-law of the plaintiff, in the year 1857 purchased lot 11 of this property, containing 2 a. 1 r. 33 p., and built a residence thereon. The house was finished in the year 1858, and shortly afterwards the plaintiff became the tenant of the house and property. The defendant was a solicitor in London, and in the year 1858 he bought some other lots of the same property under the same particulars and conditions, being respectively lots 1, 10, 14, and 16. It was proved that building was going on in the neighborhood, the plaintiff's house being within ten minutes' walk of the new railway station at Norwood. It also appeared that, during the preceding year, bricks had been burned at certain spots in lots 13 and 15, and at a spot adjoining to lot 15. It further appeared, that during the last seventeen or eighteen years, bricks had from time to time been burned at various parts of the field, of which the site of the clamp in question then formed part, such field having been divided at the time of the sale into various lots. It also appeared that bricks had previously been made on the spot where the plaintiff's house stood.

In the month of June, 1860, the defendant, with the view of burning bricks made out of the brick earth found upon his land, and thereby obtaining bricks to build upon it, erected a clamp of bricks on lot 16, at a distance of 180 yards from the plaintiff's house. It was proved that there was an annoyance to the plaintiff arising from the erection and use of the clamp as complained of in the first count sufficient *prima facie* to constitute a cause of action; but it was also proved that the erection and use of the clamp by the defendant as complained of was temporary only, and for the sole purpose of making bricks on his own land and from the clay found there, with a view to the erection of dwelling-houses on his own land; and that the clamp for burning the bricks was placed on that part of the defendant's land most distant from the plaintiff's house, and so as to create no further annoyance than necessarily resulted from the burning of bricks; and the question was whether, under the circumstances so proved, an action could be maintained in respect of such annoyance.

The Lord Chief Justice intimated that the case came within the principle laid down in *Hole v. Barlow*, 4 C. B. (N. S.) 334, and directed the jury, upon the authority of that case, that if they thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict upon the first count, independent of the small matter of whether there was an interference with the plaintiff's comfort thereby. Upon this ruling a verdict was by arrangement entered for the defendant on the first count, leave being reserved to the plaintiff to move to set it aside, if the court should be of opinion that the above ruling of the Lord Chief Justice was erroneous.

Upon the second count, a verdict was by arrangement entered for the plaintiff, with 1*s.* damages, but no question arose on that count.

In the following Michaelmas-term,

Petersdorff, Serjt., moved for a rule calling upon the defendant to show cause why a verdict should not be entered for the plaintiff on the first count for 40s. damages.

Per Curiam. (COCKBURN, C. J., WIGHTMAN, HILL, and BLACKBURN, JJ.) *Rule refused, with leave to appeal.*

The plaintiff having appealed against the above decision, a case setting forth the facts was stated, and concluded as follows:—

“If the court should be of opinion that, upon the facts as stated, the ruling of the Lord Chief Justice, founded upon the decision of *Hole v. Barlow*, was erroneous, the verdict found for the defendant on the first count is to be set aside, and a verdict entered for the plaintiff instead thereof with 40s. damages.

“If the court should be of a contrary opinion, the verdict entered for the defendant upon the first count is to stand.”

The case was argued, in Easter vacation, May 14th, before ERLE, C. J., POLLOCK, C. B., WILLIAMS and KEATING, JJ., and BRAMWELL and WILDE, BB.

Mellish (with him *Petersdorff*, Serjt., and *Garth*), for the plaintiff.

Lush (with him *Honyman*), for the defendant.

WILLIAMS, J., delivered the judgment of ERLE, C. J., KEATING, J., WILDE, B., and himself. On the argument of this case, there was some contest as to what the true question was which the court had to consider. On the part of the plaintiff it was said to have been proved at the trial, beyond dispute, that the burning of the bricks in the kilns of the defendant was a nuisance, and that the point reserved was, whether it was legalized by the other facts which the jury must be taken to have found to exist. On the part of the defendant it was said that the true point was, whether, under all the circumstances of the case, the burning of the bricks amounted to an actionable nuisance.

It is not, perhaps, material which of these contentions is correct. For the Lord Chief Justice, at the trial, directed the jury, on the authority of *Hole v. Barlow*, 4 C. B. (N. S.) 384, to find for the defendant, notwithstanding his burning the bricks had interfered with the plaintiff's comfort, if they were of opinion that the spot where the bricks were burned was a proper and convenient spot, and the burning of them was, under the circumstances, a reasonable use by the defendant of his own land. The jury, consequently, if they were of that opinion, would have been bound to find their verdict for the defendant, notwithstanding they were also of opinion that the brick-kilns of the defendant, by immitting corrupted air upon the plaintiff's house, had rendered it unfit for healthy or comfortable occupation.

It was therefore treated as a doctrine of law that, if the spot should be found by the jury to be proper or convenient, and the burning of the bricks a reasonable use of the land, these circumstances would constitute a bar to the action; and if there is, in truth, no such doctrine,

there was a misdirection: it is the same thing as if there had been a plea averring the existence of these circumstances, and a demurrer to the plea. Such a plea, though it would admit all the allegations in the declaration, would be a good plea by way of avoidance, if the direction of the Chief Justice was right. And it is not material to inquire whether it would be good as averring facts which amount to a legalization of the nuisance stated in the declaration, or as superadding facts, which, taken together with those stated in the declaration, show that the alleged annoyance was not an actionable nuisance. In either point of view the question for our consideration appears to be, whether the case of *Hole v. Barlow*, 4 C. B. (N. S.) 334, was well decided. And we are of opinion that it was not.

That decision was plainly founded on a passage in Comyns' Digest, Action upon the Case for a Nuisance (C), which is in the following words: "So an action does not lie for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbor." It may be observed that, in the language of this *dictum* (for which no authority is cited by Comyns), there is a want of precision, especially in the words "reasonable" and "convenient," which renders its meaning by no means clear. And it may be doubted whether the court, in *Hole v. Barlow*, did not misunderstand it. What is a "convenient place"? Does this expression mean, as the court understood it in that case, that the place is proper and convenient for the purpose of carrying on the trade, or does it mean that it is a place where a nuisance will not be caused to another? It has been pointed out by Mr. W. H. Willes, in his valuable edition of Gale on Easements, p. 410, note, that this latter sense of the word "convenient" is the one adopted by Hide, C. J., in *Jones v. Powell*, Palm. 536, 539; s. c. Hutt. 135, where he says, "A tan-house is necessary, for all men wear shoes, and nevertheless it may be pulled down if it be erected to the nuisance of another: in like manner of a glass-house; and they ought to be erected in places convenient for them." In the original Norman-French it is "Un tan house est necessary, car tous wear shoes; et uncore ceo poit estre pull down, &c., si est erect al nusance d'auter: et issint de glass house; Et pur ceux doient estre erect in places convenient pur eux." The term appears to be used in the same sense when applied to questions as to public nuisances. Thus it is said in Hawkins, P. C., book 1, c. 75 (2 Hawk. P. C., by Leach, p. 146, s. 10), "It seems to be agreed, that a brew house, erected in such an inconvenient place wherein the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance." It should seem, therefore, that just as the use of an offensive trade will be indictable as a public nuisance if it be carried on in an inconvenient place, *i. e.* a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an inconvenient place, *i. e.*, a place where it greatly incommodes an individual.

If this be the true construction of the expression "convenient" in the passage from Comyns' Digest, the doctrine contained in it amounts to no more than what has long been settled law, viz., that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher or brewer and the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighboring house.

In *Hole v. Barlow*, 4 C. B. (N. S.) 334, however, the court appear to have read the passage as containing a doctrine that a place may be "proper and convenient" for the carrying on of a trade, notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbor. This is a doctrine which has certainly never been judicially adopted in any case before that of *Hole v. Barlow*, and moreover the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar during the argument, and more especially with the case of *Walter v. Selfe*, 4 De Gex & Sm. 315. And the introduction of such a doctrine into our law would, we think, lead to great inconvenience and hardship, because, as was forcibly urged by Mr. Mellish, in arguing for the plaintiff, if the doctrine is to be maintained at all, it must be maintained to the extent that, however ruinous may be the amount of nuisance caused to a neighbor's property by carrying on an offensive trade, he is without redress if a jury shall deem it right to find that the place where the trade is carried on is a proper and convenient place for the purpose.

It should be observed that the direction of the judge to the jury in *Hole v. Barlow*, 4 C. B. (N. S.) 334, which was upheld by the Court of Common Pleas, was simply that the verdict ought to be for the defendant if the place where the bricks were burned was a convenient and proper place for the purpose. But in the present case, the Lord Chief Justice's direction to the jury pointed at a further condition, viz., if the burning of the bricks was under the circumstances a reasonable use by the defendant of his own land. It remains, therefore, to consider whether the doctrine adopted in *Hole v. Barlow*, if accompanied with this addition, is maintainable.

If it be good law, that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land. But if it is not good law, and if the true doctrine is, that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be, then surely the jury cannot properly be asked whether the causing of the nuisance was a reasonable use of the land.

If such a question is proper for their consideration in an action such

as the present, for a nuisance by immitting corrupted air into the plaintiff's house, we can see no reason why a similar question should not be submitted to the jury in actions for other violations of the ordinary rights of property; *e. g.* the transmission by a neighbor of water in a polluted condition. But certainly it would be difficult to maintain, as the law now stands, that the jury, in such an action, ought to be told to find for the defendant if they thought that the manufactory which caused the impurity of the water was built on a proper and convenient spot, and that the working of it was a reasonable use by the defendant of his own land. Again, where an easement has been gained in addition to the ordinary rights of property, *e. g.* where a right has been gained to the lateral passage of light and air, no one has ever suggested that the jury might be told, in an action for obstructing the free passage of the light and air, to find for the defendant if they were of opinion that the building which caused the obstruction was erected in a proper and convenient place, and in the reasonable enjoyment by the defendant of his own land. And yet, on principle, it is difficult to see why such a question should not be left to the jury if *Hole v. Barlow* was well decided.

We are, however, of opinion that the decision in that case was wrong, and, consequently, that the direction of the Lord Chief Justice, which was founded on it, was erroneous, that the verdict for the defendant ought to be set aside, and a verdict entered for the plaintiff.

POLLOCK, C. B. The question in this case is, whether the direction of the Lord Chief Justice, professing to be founded on the decision of the Court of Common Pleas in *Hole v. Barlow*, 4 C. B. (N. S.) 834, was right, and in my judgment substantially it was right, viz., taking it to have been as stated in the case, viz., "that if the jury thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict." I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances, — the place where, the time when, the alleged nuisance, what, the mode of committing it, how, and the duration of it, whether temporary or permanent, occasional or continual, — as to make it impossible to lay down any rule of law applicable to every case, and which will also be useful in assisting a jury to come to a satisfactory conclusion: it must at all times be a question of fact with reference to all the circumstances of the case.

Most certainly in my judgment it cannot be laid down as a legal proposition or doctrine, that anything which, under any circumstances, lessens the comfort or endangers the health or safety of a neighbor, must necessarily be an actionable nuisance. That may be a nuisance in Grosvenor Square which would be none in Smithfield Market; that may be a nuisance at midday which would not be so at midnight; that

may be a nuisance which is permanent and continual, which would be no nuisance if temporary or occasional only. A clock striking the hour, or a bell ringing for some domestic purpose, may be a nuisance, if unreasonably loud and discordant, of which the jury alone must judge; but although not unreasonably loud, if the owner, from some whim or caprice, made the clock strike the hour every ten minutes, or the bell ring continually, I think a jury would be justified in considering it to be a very great nuisance. In general, a kitchen chimney, suitable to the establishment to which it belonged, could not be deemed a nuisance; but if built in an inconvenient place or manner, on purpose to annoy the neighbors, it might, I think, very properly be treated as one. The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some enjoyment abridged, to provide for the more general convenience or necessities of the whole community; and I think the more the details of the question are examined, the more clearly it will appear that all that the law can do is to lay down some general and vague proposition which will be no guide to the jury in each particular case that may come before them.

I am of opinion that the passage in Comyns' Digest, Action upon the Case for a Nuisance (C), is good law. I think the word "reasonable" cannot be an improper word, and too vague to be used on this occasion, seeing that the question whether a contract has been reasonably performed with reference to time, place, and subject-matter, is one that is put to a jury almost as often as a jury is assembled. If the act complained of be done in a convenient manner, so as to give no unnecessary annoyance, and be a reasonable exercise of some apparent right, or a reasonable use of the land, house, or property of the party under all the circumstances, in which I include the degree of inconvenience it will produce, then I think no action can be sustained, if the jury find that it was reasonable, — as the jury must be taken to have found that it was reasonable that the defendant should be allowed to do what he did, and reasonable that the plaintiff should submit to the inconvenience occasioned by what was done. And this gets rid of the difficulty suggested in the judgment just read by my Brother Williams; because it cannot be supposed that a jury would find that to be a reasonable act by a person which produces any ruinous effect upon his neighbors.

With respect to the proposed judgment of the court, as the case does not state that leave was given by the consent of the defendant's counsel, or indeed at all, to enter a verdict for the plaintiff for 40s. damages, it appears to me that all that this court of error can do, if it disapproves of the direction of the Lord Chief Justice, is to award a *verdict de novo*, that the jury may find a verdict under a proper direction; for there is strong ground for contending that the entire plot of ground, of which the plaintiff's and the defendant's land formed a part, was sold in various lots, on the understanding that the brick earth should be made into bricks and burned, in order to erect houses on the defendant's

lots, and it would seem not perfectly just that the purchaser of one of the lots should actually turn his brick earth into bricks, and build a house, and then deny the same advantage to his neighbors. I think therefore that, if my learned brothers are right in denying to the jury the power of finding that any act was an act reasonable to be done, still, on the statement of the present case, the court has not power to enter a verdict for the plaintiff for 40s.

But in my opinion the judgment of the court below ought to be affirmed.

MARTIN, B., read the judgment of

BRAMWELL, B. I am of opinion that this judgment should be reversed. The defendant has done that which, if done wantonly or maliciously, would be actionable, as being a nuisance to the plaintiff's habitation by causing a sensible diminution of the comfortable enjoyment of it. This, therefore, calls on the defendant to justify or excuse what he has done. And his justification is this: He says that the nuisance is not to the health of the inhabitants of the plaintiff's house, that it is of a temporary character, and is necessary for the beneficial use of his, the defendant's, land, and that the public good requires he should be entitled to do what he claims to do.

The question seems to me to be, Is this a justification in law, — and, in order not to make a verbal mistake, I will say, — a justification for what is done, or a matter which makes what is done no nuisance? It is to be borne in mind, however, that, in *fact*, the act of the defendant is a nuisance such that it would be actionable if done wantonly or maliciously. The plaintiff, then, has a *prima facie* case. The defendant has infringed the maxim *Sic utere tuo ut alienum non ledas*. Then, what principle or rule of law can he rely on to defend himself? It is clear to my mind that there is some exception to the general application of the maxim mentioned. The instances put during the argument, of burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are; and it cannot be doubted that, if a person maliciously and without cause made close to a dwelling-house the same offensive smells as may be made in emptying a cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is. For that is to suppose they violate their duty, and that, if they discharged their duty, such matters would be actionable, which I think they could not and ought not to be. There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who

do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner — not unnatural nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbor's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.

Then can this principle be extended to, or is there any other principle which will comprehend, the present case? I know of none: it is for the defendant to show it. None of the above reasoning is applicable to such a cause of nuisance as the present. It had occurred to me, that any not unnatural use of the land, if of a temporary character, might be justified; but I cannot see why its being of a temporary nature should warrant it. What is temporary, — one, five, or twenty years? If twenty, it would be difficult to say that a brick kiln in the direction of the prevalent wind for twenty years would not be as objectionable as a permanent one in the opposite direction. If temporary in order to build a house on the land, why not temporary in order to exhaust the brick earth? I cannot think then that the nuisance being temporary makes a difference.

But it is said that, temporary or permanent, it is lawful because it is for the public benefit. Now, in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case, — whenever a thing is for the public benefit, properly understood, — the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that trains should run, but not unless they pay their expenses. If one of those expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit they should if the wood is not their own. If, though the wood were their own, they still

would find it *compensated them* to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains. So in like way in this case a money value indeed cannot easily be put on the plaintiff's loss, but it is equal to some number of pounds or pence, £10, £50, or what not: unless the defendant's profits are enough to compensate this, I deny that it is for the public benefit he should do what he has done; if they are, he ought to compensate.

The only objection I can see to this reasoning is, that by injunction or by abatement of the nuisance a man who would not accept a pecuniary compensation might put a stop to works of great value, and much more than enough to compensate him. This objection, however, is comparatively of small practical importance; it may be that the law ought to be amended, and some means be provided to legalize such cases, as I believe is the case in some foreign countries on giving compensation; but I am clearly of opinion that, though the present law may be defective, it would be much worse, and be unjust and inexpedient, if it permitted such power of inflicting loss and damage to individuals, without compensation, as is claimed by the argument for the defendant.

Since the decision of *Hole v. Barlow*, 4 C. B. (N. S.) 334, claims have been made to poison and foul rivers, and to burn up and devastate land, on the ground of public benefit. I am aware that case did not decide so much, but I have a difficulty, for the reasons I have mentioned, in saying that what has been so contended for does not follow from the principles enunciated in that case.

If we look to analogous cases I find nothing to countenance the defendant's contention. A riparian owner cannot take water for the public benefit; he cannot foul it for the public benefit, if to the prejudice of another owner. A common cannot be enclosed on such principle. A window, the fee-simple of which is 5s., cannot be stopped up by a building worth £1,000,000, of the greatest public benefit, nor a way. The windows of such a house might be blocked from light and air, however contrary that might be to the public benefit.

It is true that a man's character may be unjustly attacked in some cases without remedy. But we ought to follow the rule, not the exception; and that that is an exception and anomalous cannot be doubted. It is shown by such instances as I have put, and by this: if a man sees another apparently committing a felony, he is bound by law to prevent it if the man is really committing it; but if it turns out that no felony is being committed, the arrest of such a man would be an assault and false imprisonment.

As to the somewhat remote illustration of taking a man's land in case of foreign invasion, it is said that is a case of "necessity;" but it can hardly be a "necessity" to burn bricks on the defendant's land, to the nuisance of the plaintiff, without compensation.

I confess then I can see no reason or principle in the defendant's contention.

With the greatest respect for those who decided *Hole v. Barlow*, I cannot, for the reasons I have given, agree with it. That case reminds me strongly of what the late Lord Denman said, that he suspected a case very much when he found it continually quoted immediately after its decision; and certainly *Hole v. Barlow* has been so quoted, and defences made on its authority which never would have been thought of before it appeared. It stands alone. It is practically opposed to cases of daily occurrence, where such a point might have been made and was not. I have a difficulty in putting a meaning on the words "convenient, reasonable, and proper," as there used. "Convenient, reasonable, and proper," as regards the sufferer? No. "Convenient, reasonable, and proper," as regards the defendant? That cannot be, as that might place the nuisance close to the plaintiff, to the entire loss of the power of dwelling in his house. "Convenient, reasonable, and proper" as between the two? Then the nuisance may lawfully be greater, as the defendant's premises are smaller, and so his kiln *must* be nearer. "Convenient, reasonable, and proper" as regards the public good? That I have already dealt with. These words are perfectly intelligible when applied to such nuisances as would form the common and ordinary use of land, &c. See the comments on the case by Mr. W. H. Willes, in his edition of *Gale on Easements*, p. 409, note. It is countenanced by the passage from *Comyns' Digest*, tit. Action upon the Case for a Nuisance (C) alone, which is contradicted in the same book, and is sufficiently dealt with by the judgment of my Brother Williams.

In the result, then, I think it should be overruled, — which practically is the question here, — and that our judgment should be for the plaintiff.

Judgment reversed and entered for the plaintiff for 40s.¹

ST. HELEN'S SMELTING COMPANY v. TIPPING.

HOUSE OF LORDS. 1865.

[*Reported 11 H. L. C. 642.*]

THIS was an action brought by the plaintiff to recover from the defendants damages for injuries done to his trees and crops, by their works. The defendants are the directors and shareholders of the St. Helen's Copper Smelting Company (Limited). The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor house and about 1800 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that

¹ The parties afterwards agreed to enter a *stet processus*. — Rep. See *Cavey v Ledbitter*, 13 C. B. (N. S.) 470, *accord*.

"the defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapors, and other noxious matter, to issue from the said works, and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit, and herbage, were greatly injured; the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed, and also the reversionary lands and premises were depreciated in value." The defendants pleaded, not guilty.

The cause was tried before Mr. Justice *Mellor* at Liverpool in August, 1863, when the plaintiff was examined and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapor, which, when the wind was in a particular direction, affected persons as well as plants in his grounds. On cross-examination, he said he had seen the defendants' chimney before he purchased the estate, but he was not aware whether the works were then in operation. On the part of the defendants, evidence was called to show that the whole neighborhood was studded with manufactories and tall chimneys, that there were some alkali works close by the defendants' works, that the smoke from one was quite as injurious as the smoke from the other, that the smoke of both sometimes united, and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendants' works existed before the plaintiff bought the property was also relied on.

The learned judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbors; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

The defendants' counsel submitted that the three questions which ought to be left to the jury were, "whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." The learned judge did not put the questions in this form, but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer

was in the affirmative. Whether the business there carried on was an ordinary business for smelting copper, and the answer was, "We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was, "We do not." The verdict was therefore entered for the plaintiff, and the damages were assessed at £361 18s. 4½d. A motion was made for a new trial, on the ground of misdirection, but the rule was refused. 4 Best & S. 608. Leave was however given to appeal, and the case was carried to the Exchequer Chamber, where the judgment was affirmed; Lord Chief Baron Pollock there observing, "My opinion has not always been that which it is now. Acting upon what has been decided in this court, my Brother Mellor's direction is not open to a bill of exception." 4 Best & S. 616. This appeal was then brought.

The judges were summoned, and Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee, attended.

The Attorney-General (Sir R. Palmer) and Mr. Webster, for the appellants (defendants in the court below).

Mr. Brett, Mr. Mellish and Mr. Milward were for the respondent, but were not called upon to address the House.

THE LORD CHANCELLOR (LORD WESTBURY). — My Lords, as your Lordships, as well as myself, have listened carefully to the able argument on the part of the appellants, and are perfectly satisfied with the decision of the court below, and are of opinion that, subject to what we may hear from the learned judges, the direction to the jury was right, I would submit that two questions should be put to the learned judges; but at the same time the learned judges will be good enough to understand that if they desire further argument of the case the respondent's counsel must be heard. Otherwise the following are the questions which I propose to be put to them: Whether directions given by the learned judge at Nisi Prius to the jury were correct? or, Whether a new trial ought to be granted in this case? The learned judges will intimate to your Lordships whether they desire to hear further argument on the part of the respondent's counsel, or whether they are prepared to answer the questions put to them by your Lordships.

MR. BARON MARTIN said that the judges did not require the case to be further argued, but they requested to have a few moments' consideration to give their answer to the questions put to them.

Adjourned for a short time, and resumed.

MR. BARON MARTIN. My Lords, in answer to the questions proposed by your Lordships to the judges, I have to state their unanimous opinion that the directions given by the learned judge to the jury were correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last twenty years.

THE LORD CHANCELLOR. My Lords, I think your Lordships will be

satisfied with the answer we have received from the learned judges to the questions put by this House.

My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.¹

Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper-smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of the present appellants, in their works at St. Helen's. Of the effect of the vapors exhalng from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My Lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only ground upon which your Lordships are asked to set aside that verdict, and to direct a new trial, is this, that the whole neighborhood where these copper-

¹ See *Hennessy v. Carmony*, 50 N. J. Eq. 616.

smelting works were carried on, is a neighborhood more or less devoted to manufacturing purposes of a similar kind, and therefore it is said, that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My Lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course, my Lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them (and they are sufficiently unfolded by the judgment of the learned judges in the court below), I advise your Lordships to affirm the decision of the court below, and to refuse the new trial, and to dismiss the appeal with costs.

LORD CRANWORTH. My Lords, I entirely concur in opinion with my noble and learned friend on the Woolsack, and also in the opinion expressed by the learned judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years; I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice Mellor. He says, "It must be plain, that persons using a lime-kiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.

I perfectly well remember, when I had the honor of being one of the Barons of the Court of Exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke, in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, "You must look at it not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields;" because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.

There is nothing of that sort, however, in the present case. It seems to me that the distinction, in matters of fact, was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law, either abstractedly or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE. My Lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included: The defendants say, "If you do not mind you will stop the progress of works of this description." I agree that it is so, because, no doubt, in the county of Lancaster above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, "I will bring an action against you for this and that, and so on." Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.

My Lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

*Judgment of the Exchequer Chamber affirming the judgment of the Court of Queen's Bench affirmed; and appeal dismissed, with costs.*¹

¹ See the important case of *Walter v. Selfe*, 4 De G. & Sm. 815; also *Salvin v. Brancepeth Coal Co.*, L. R. 9 Ch. 705; *Reinkardt v. Mentasti*, 42 Ch. D. 685; *Sanders-Ciark v. Grosvenor Mansions*, [1900] 2 Ch. 873; *Campbell v. Seaman*, 63 N. Y. 508; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268; *Same v. Spangler*, 86 Md. 562; *Boston Ferrule Co. v. Hills*, 159 Mass. 147.

"In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. In densely populated communities the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them." KNOWLTON, J., in *Rogers v. Elliott*, 146 Mass. 349, 351. See also *Powell v. Bentley Furn. Co.*, 34 W. Va. 812.

GILBERT v. SHOWERMAN.

SUPREME COURT OF MICHIGAN. 1871.

[Reported 23 Mich. 448.]

APPEAL in Chancery from Wayne Circuit.

This suit was brought by William Gilbert against Delos Showerman, Henry E. Champion and William R. Newkirk.

The facts are fully stated in the opinion.

Ward & Palmer, for complainant.

C. J. Reilly and *Moore & Griffin*, for defendants.

COOLEY, J. This is a bill to enjoin a private nuisance.

The complainant is owner of a city lot in the city of Detroit, covered by a four-story brick building, fronting on the south side of Jefferson Avenue and extending to Woodbridge Street. The lower story of the building has been accustomed to rent as a store or warehouse, while the upper stores are occupied by him, with his family, as a dwelling-house, and the roof as a convenient place for drying clothes. His ownership has continued for twenty years or more. Adjoining his building, on the east, is another four-story brick building, and he avers that the defendants, being in possession thereof, have set up therein a steam-engine and boiler, and put in other machinery and fixtures, and fitted the same up as a steam flouring-mill, and are running, and threaten to continue to run, the said mill with the power of said steam-engine and boiler, and to use the said building with the machinery therein as such mill. He further avers that the use of such building, as a mill, causes great injury, inconvenience and damage to complainant in the occupation and use of his said building, and endangers the safety of the building itself; that the motion of the machinery, in running said mill, shakes complainant's building, weakening the walls thereof and permanently damaging the same, and creates a rumbling noise and a trembling motion, that causes the doors, windows, crockery and any other fixtures or articles that are loose in complainant's dwelling-house to rattle continuously; that the fires of said boiler and steam-engine generate large quantities of soot and cinders, which are thrown out therefrom on the roof of complainant's said dwelling-house, and that the steam is thrown out from said boiler and engine, through the exhaust pipes, and condenses and falls thereon, keeping the same, and the air above it, foul and damp, and that flour collects about said mill, from the use thereof, and turns musty and sour, and poisons the air in, and about, complainant's said building. By means whereof complainant alleges that his dwelling-house is rendered uncomfortable, unhealthy, noisy and unfit for occupation, and complainant is deprived of the use of the roof thereof for the ordinary purpose of drying clothes thereon, and is hindered and prevented from renting his store and deriving gain and profit therefrom. Wherefore

he prays a perpetual injunction to restrain the defendants from using their said building for such steam flouring-mill, and from using or running said steam-engine, boiler and machinery therein.

The case was heard in the court below on pleadings and proofs, and although there is some conflict in the evidence, there does not appear to be any serious difficulty in arriving at a satisfactory conclusion regarding the leading facts. The buildings mentioned as occupied by the parties respectively, are situated upon one of the main business streets of the city of Detroit, in a long block of continuous buildings, which extend through to, and have a front upon, another business street of less prominence. All the buildings appear to have been constructed with a view primarily and mainly to occupation for business purposes, and the location not less than the nature of the buildings has caused them to be so occupied. The occupants are in the main merchants, but some manufactures are also carried on in the block, among which is the manufacture of tobacco, requiring heavy machinery moved by the power of steam. All the time a greater or less number of families have resided in the block, generally over stores and manufactories, but the tendency has been for families to give way to business, and at present but few remain; probably not more than would be found in almost any business block in a town of corresponding size. The defendants began converting their building into a steam flouring-mill very early in 1870, and had the mill in operation about the first of July in that year. The present bill was filed more than a year after the machinery was put in, and more than eight months after the mill was in operation; and it does not appear that while the improvement was going on, or afterwards, except by the commencement of suit, there was any remonstrance on the part of complainant. There can be no question that the mill causes annoyance to complainant and his family, and renders the occupation of his building, as a residence, less desirable, but we are not satisfied by the evidence that there has been any want of due care, or any wilful disregard of the rights of their neighbors, in the manner in which the defendants have carried on their business, and there is strong showing that the mill was carefully constructed with a view to avoiding, so far as should be practicable, any annoyance or injury to others. We have no doubt the defendants put in their machinery in entire good faith, supposing they were legally and morally entitled to do so, and that it is not possible for them entirely to avoid causing some annoyance and discomfort to complainant, unless they discontinue wholly the use of their machinery. Whether the value of complainant's premises for business purposes is reduced by the proximity of the mill is a question we need not consider, though some evidence has been produced on both sides of it. For some kinds of occupation his building would undoubtedly be less valuable.

This, we think, is a fair statement of the case; and the question which it presents is, whether the complainant, in consequence of the annoyance which the business of the defendants causes him, is entitled

to have that business enjoined. It is not a question of mere damages, such as might arise in an action on the case, but it goes to the foundation of the right in defendants, under the circumstances, to make use of their premises in the manner they have decided to be for their interest; and if the conclusion shall be adverse to them, the loss in the breaking up of their business, and in the depreciation of machinery, which can only be made use of after removal to some new locality, must be very considerable. Nevertheless, if it is the legal right of complainant to have the annoyance to himself and his family enjoined, the unavoidable consequent loss to the defendants cannot preclude this remedy. The serious consequences to them can be reason only for more careful and patient consideration of the case before the legal principles governing it are applied to their detriment.

Generally speaking, it may be said that every man has a right to the exclusive and undisturbed enjoyment of his premises, and to the proper legal redress if this enjoyment shall be interrupted or diminished by the act of others. The redress, if the injury is slight or merely casual, or if it is in any degree involved in doubt, should be by action for the recovery of damages;¹ but if permanent in its nature, so that by persistence in it the wrong-doer might, in time, acquire rights against the owner, it is admissible for the court of chancery to interfere by injunction, provided the injury is conceded or clearly established; *Webb v. Portland Manuf. Co.*, 3 Sum. 189; *Walker v. Shepardson*, 2 Wis. 384; though the power to do so should be cautiously and sparingly exercised. *Attorney General v. Nichol*, 16 Ves. 338; *Rosser v. Randolph*, 7 Port. 238. An offensive trade or manufacture may call as legitimately for the interference of equity as any other nuisance, for, as is said by Sir William Blackstone, though these are lawful and necessary, yet they

¹ "All, then, that can be said from the bill, answer, and findings of the decree, is that, from time to time, prior to the filing of the bill, through the *negligence or wrongful act* of the defendants, complainant was injured in the manner stated in his bill. The decree in effect finds that, while using 'West Virginia coal,' no appreciable dense smoke was emitted, and there is no conflict in the evidence as to the fact that defendants proposed using that quality of fuel, and had done so when it could be obtained.

"While it is true that the consequences of their not being able to get, or unwillingness to use, the better and higher priced quality of coal, cannot be visited upon complainant without compensation in damages, it by no means follows that a court of equity will make them liable to its penalties for contempt, if they should be compelled to use the inferior fuel temporarily to avoid abandoning their business. The remedy for such an injury is complete and adequate at law. There is no theory of this case, conceding all that is found in the decree, upon which it can be said an injury is shown which cannot be fully ascertained and adequately compensated by damages in an action at law, or which, from its continuance or permanent mischief, will necessarily occasion constantly recurring grievances, which cannot be otherwise prevented than by injunction, and, therefore, upon the authorities cited above, no ground is shown for the exercise of equity jurisdiction." *WILKIN, C. J.*, in *Nelson v. Milligan*, 151 Ill. 402, 469.

As to the interposition of equity where there are no exceptional risks and the danger is of accidental injuries only, see *Cooke v. Forbes*, L. R. 5 Eq. 166.

should be exercised in remote places. 2 Bl. Com. 217; *Catlin v. Valentine*, 9 Paige, 575; *Hackney v. State*, 8 Ind. 494. The right, nevertheless, to have such a business restrained is not absolute and unlimited, but is, and must be in the nature of things, subject to reasonable limitations which have regard to the rights of others not less than to the general public welfare. One man's comfort and enjoyment with reference to his ownership of a parcel of land cannot be considered by itself distinct from the desires and interests of his neighbors, as otherwise the wishes of one might control a whole community, and the person most ready to complain might regulate to suit himself, the business that should be carried on in his neighborhood. In a crowded city some annoyance to others is inseparable from almost any employment, and while the proximity of the stables of the dealers in horses, or of the shops of workers in iron or tin, seems an intolerable nuisance to one, another is annoyed and incommoded, though in less degree, by the bundles and boxes of the dealer in dry goods, and the noise and jar of the wagons which deliver and remove them. Indeed, every kind of business is generally regarded as undesirable in the parts of a city occupied most exclusively by dwellings, and the establishment of the most cleanly and quiet warehouse might, in some neighborhoods, give serious offence and cause great annoyance to the inhabitants. This cannot be otherwise so long as the tastes, desires, judgments and interests of men differ as they do, and no rule of law can be just which, in endeavoring to protect the interests and subserve the wishes of a complaining party, fails to have equal regard to the interests and wishes of others. The true principle has been said by an eminent jurist to be one "growing out of the nature of well ordered civil society, and every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." Shaw, Ch. J., in *Commonwealth v. Alger*, 7 Cush. 84.

The question, therefore, in the case at bar must be, whether there is anything in the nature of the case which renders it unreasonable, in view of the relative rights, interests and wishes of both parties and the general welfare of the public, that defendants should continue upon their premises the business they are now engaged in, or whether, on the other hand, the resulting annoyance to the complainant must be regarded as one which is incident to the lawful enjoyment of property by another, and which, consequently, can form no basis for legal redress.

And in considering this question, the fact is to be kept in view that the business of the defendants is one which is lawful in itself and necessary to the community, and which the public good requires shall be carried on by some persons in some locality. The question is, whether it be proper and right that it be carried on in the particular locality where it is now established. Even the most offensive trade, as we have seen, is allowed to be carried on in a *remote* place; and this means, not a place remote from all other occupations and trades, but remote from such other occupation or trade as would be specially injured or incommoded by its proximity; in other words, in a place, which, in view of its offensive nature, is a proper and suitable one for its establishment. The most offensive trades are lawful, as well as the most wholesome and agreeable; and all that can be required of the men who shall engage in them is, that due regard shall be had to fitness of locality. They shall not carry them on in a part of the town occupied mainly for dwellings, nor, on the other hand, shall the occupant of a dwelling in a part of the town already appropriated to such trades, have a right to enjoin another coming in because of its offensive nature. Reason, and a just regard to the rights and interests of the public, require that in such case the enjoyments of pure air and agreeable surroundings for a home shall be sought in some other quarter; and a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it.

In the case before us we find that the defendants are carrying on a business not calculated to be specially annoying, except to the occupants of dwellings. They chose for its establishment a locality where all the buildings had been constructed for purposes other than for residence. Families, to some extent, occupied these buildings, but their occupation was secondary to the main object of their construction, and we must suppose that it was generally for reasons which precluded the choice of a more desirable neighborhood. The number of these families, moreover, was decreasing, and in view of the size of the block, was really insignificant at the time this machinery was put in. Some kinds of business were then carried on in the block, which were likely to be equally offensive to adjoining proprietors with that of the defendants, and it is not shown that any complaint was made of them. In view of these facts we think it is not shown that the defendants were bound to know they were invading the legal rights of other persons when they established their present business, nor can we say that the evidence satisfies us that they selected an unsuitable locality for the purpose.

We cannot shut our eyes to the obvious truth that if the running of this mill can be enjoined, almost any manufactory in any of our cities can be enjoined upon similar reasons. Some resident must be incommoded or annoyed by almost any of them. In the heaviest business quarters and among the most offensive trades of every city, will be found persons who, from motives of convenience, economy or necessity,

have taken up there their abode; but in the administration of equitable police, the greater and more general interests must be regarded rather than the inferior and special. The welfare of community cannot be otherwise subserved and its necessities provided for. Minor inconveniences must be remedied by actions for the recovery of damages rather than by the severe process of injunction.

On the whole case we are of opinion that the complainant, having taken up his residence in a portion of the city mainly appropriated to business purposes, cannot complain of the establishment of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner. We do not find from the evidence that the business of defendants was thus objectionable, or that in the manner of conducting it there is special ground of complaint. And the decree dismissing the bill must, therefore, be affirmed with costs. But the dismissal is to be without prejudice to any proceeding the complainant may be advised to take at law.

The other Justices concurred.¹

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STURGES v. BRIDGMAN.

COURT OF APPEAL IN CHANCERY. 1879.

[*Reported 11 Ch. Dis. 852.*]

THE plaintiff in this case was a physician. In the year 1865 he purchased the lease of a house in Wimpole Street, London, which he occupied as his professional residence.

Wimpole Street runs north and south, and is crossed at right angles by Wigmore Street. The plaintiff's house was on the west side of Wimpole Street, and was the second house from the north side of Wigmore Street. Behind the house was a garden, and in 1873 the plaintiff erected a consulting-room at the end of his garden.

The defendant was a confectioner in large business in Wigmore Street. His house was on the north side of Wigmore Street and his kitchen was at the back of his house, and stood on ground which was formerly a garden and abutted on the portion of the plaintiff's garden on which he built the consulting-room. So that there was nothing between the plaintiff's consulting-room and the defendant's kitchen but

¹ See *Robinson v. Baugh*, 31 Mich. 290; *Euler v. Sullivan*, 75 Md. 616; *Davis v. Whitney*, 68 N. H. 66; *Ladd v. Granite State Brick Co.*, *ib.* 186; *Romer v. St. Paul City Ry. Co.*, 75 Minn. 211.

As to the liability to an injunction of two or more persons, acting independently, for a nuisance, when the act of either alone would not have amounted to a nuisance see *Lambton v. Mellish*, [1894] 3 Ch. 168; *Sadler v. Great Western Ry. Co.*, [1896] 2 Q. B. 688, [1896] A. C. 450.

the party-wall. The defendant had in his kitchen two large marble mortars set in brick-work built up to and against the party-wall which separated his kitchen from the plaintiff's consulting-room, and worked by two large wooden pestles held in an upright position by horizontal bearers fixed into the party-wall. These mortars were used for breaking up and pounding loaf-sugar and other hard substances, and for pounding meat.

The plaintiff alleged that when the defendant's pestles and mortars were being used, the noise and vibration thereby caused were very great, and were heard and felt in the plaintiff's consulting-room, and such noise and vibration seriously annoyed and disturbed the plaintiff, and materially interfered with him in the practice of his profession. In particular the plaintiff stated that the noise prevented him from examining his patients by auscultation for diseases of the chest. He also found it impossible to engage with effect in any occupation which required thought and attention.

The use of the pestles and mortars varied with the pressure of the defendant's business, but they were generally used between the hours 10 A. M. and 1 P. M.

The plaintiff made several complaints of the annoyance, and ultimately brought this action, in which he claimed an injunction to restrain the defendant from using the pestles and mortars in such manner as to cause him annoyance.

The defendant stated in his defence that he and his father had used one of the pestles and mortars in the same place and to the same extent as now for more than sixty years, and that he had used the second pestle and mortar in the same place and to the same extent as now for more than twenty-six years. He alleged that if the plaintiff had built his consulting-room with a separate wall, and not against the wall of the defendant's kitchen, he would not have experienced any noise or vibration; and he denied that the plaintiff suffered any serious annoyance, and pleaded a prescriptive right to use the pestles and mortars under the 2 & 3 Will. 4, c. 71.

Issue was joined, and both parties went into evidence. The result of the evidence was that the existence of the nuisance was, in the opinion of the court, sufficiently proved; and it also appeared that no material inconvenience had been felt by the plaintiff until he built his consulting-room.

The action came on for trial May 31, 1878, before *Jessel*, M. R., who held that the plaintiff was entitled to an injunction.¹

From this decision the defendant appealed. The appeal came on to be heard on the 13th of June, 1879.

Chitty, Q. C., and *Methold*, for the appellant.

Waller, Q. C., and *S. Dickenson*, for the plaintiff.

1879, July 1. *THESIGER*, L. J., delivered the judgment of the court (*JAMES*, *BAGGALLAY*, and *THESIGER*, L. JJ.) as follows:—

¹ The opinion of the Master of the Rolls is omitted.

The defendant in this case is the occupier, for the purpose of his business as a confectioner, of a house in Wigmore Street. In the rear of the house is a kitchen, and in that kitchen there are now, and have been for over twenty years, two large mortars in which the meat and other materials of the confectionery are pounded. The plaintiff, who is a physician, is the occupier of a house in Wimpole Street, which until recently had a garden at the rear, the wall of which garden was a party-wall between the plaintiff's and the defendant's premises, and formed the back wall of the defendant's kitchen. The plaintiff has, however, recently built upon the site of the garden a consulting-room, one of the side walls of which is the wall just described. It has been proved that in the case of the mortars, before and at the time of action brought, a noise was caused which seriously inconvenienced the plaintiff in the use of his consulting-room, and which, unless the defendant had acquired a right to impose the inconvenience, would constitute an actionable nuisance. The defendant contends that he had acquired the right, either at common law or under the Prescription Act, by uninterrupted user for more than twenty years.

In deciding this question one more fact is necessary to be stated. Prior to the erection of the consulting-room no material annoyance or inconvenience was caused to the plaintiff or to any previous occupier of the plaintiff's house by what the defendant did. It is true that the defendant in the 7th paragraph of his affidavit speaks of an invalid lady who occupied the house upon one occasion, about thirty years before, requesting him if possible to discontinue the use of the mortars before eight o'clock in the morning; and it is true also that there is some evidence of the garden wall having been subjected to vibration, but this vibration, even if it existed at all, was so slight, and the complaint, if it could be called a complaint, of the invalid lady, and can be looked upon as evidence, was of so trifling a character that, upon the maxim *de minimis non curat lex*, we arrive at the conclusion that the defendant's acts would not have given rise to any proceedings either at law or in equity. Here then arises the objection to the acquisition by the defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action. Can user which is neither preventable nor actionable found an easement? We think not. The question, so far as regards this particular easement claimed, is the same question whether the defendant endeavors to assert his right by common law or under the Prescription Act. That Act fixes periods for the acquisition of easements, but, except in regard to the particular easement of light, or in regard to certain matters which are immaterial to the present inquiry, it does not alter the character of easements, or of the user or enjoyment by which they are acquired. This being so, the law governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or

user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbor of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavors to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence. Upon this principle it was decided in *Webb v. Bird*, 13 C. B. (N. S.) 841, that currents of air blowing from a particular quarter of the compass, and in *Chasemore v. Richards*, 7 H. L. C. 349, that subterranean water percolating through the strata in no known channels, could not be acquired as an easement by user; and in *Angus v. Dalton*, 4 Q. B. D. 162, a case of lateral support of buildings by adjacent soil, which came on appeal to this court, the principle was in no way impugned, although it was held by the majority of the court not to be applicable so as to prevent the acquisition of that particular easement. It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply your consent to your neighbor enjoying something which passes from your tenement to his, as to his subjecting your tenement to something which comes from his, when in both cases you have no power of prevention. But the affirmative easement differs from the negative easement in this, that the latter can under no circumstances be interrupted except by acts done upon the servient tenement; but the former, constituting, as it does, a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption. To put concrete cases, — the passage of light and air to your neighbor's windows may be physically interrupted by you, but gives you no legal grounds of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both. Noise is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action. *Webb v. Bird* and *Chasemore v. Richards* are not, therefore, direct authorities governing the present case. They are, however, illustrations of the principle which ought to govern it; for until the noise, to take this case, became an actionable nuisance, which it did not at any time before the consulting-room was built, the basis of the presumption of the consent, viz., the power of prevention physically or by action, was never present.

It is said that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences; for a man might go, say into the midst of the tanneries of Bermondsey, or into any other locality de-

voted to a particular trade or manufacture of a noisy or unsavory character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith's forge built away from all habitations, but to which, in course of time, habitations approach. We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not, is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equally degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to insure what he does from being at any time an annoyance to his neighbor; but the neighbor himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes. The Master of the Rolls in the court below took substantially the same view of the matter as ourselves, and granted the relief which the plaintiff prayed for; and we are of opinion that his order is right and should be affirmed, and that this appeal should be dismissed with costs.¹

¹ See *Mellor v. Spateman*, 1 Wms. Saunds. 346 b, note.

"Another objection to the defendant's title by prescription is, that until lately the plaintiffs suffered no damage from the alleged nuisance, and therefore could not interpose to prevent its continuance. But it is very clear that where a party's right of property is invaded, he may maintain an action for the invasion of his right, without proof of actual damage. So it was decided in *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 247, and the principle is unquestionable." WILDE, J., in *Dana v. Valentine*, 5 Met. 8, 14 (1842).

"To constitute an adverse user requisite to sustain the right, it must be shown that the user, during the entire statutory period, has produced an injury equal to

SECTION II.

EARTH.

BROWN v. ROBINS.

EXCHEQUER. 1859.

[Reported 4 H. & N. 186.]

DECLARATION. — That whereas, before and at the time of the committing of the grievances, &c., the plaintiff was possessed of certain land with a certain house and outbuildings standing and being thereon; and whereas there were certain foundations of and supporting the said house and outbuildings, which the plaintiff had of right enjoyed and ought to enjoy, yet the defendant wrongfully, negligently, carelessly and improperly, without leaving sufficient support in that behalf, worked certain mines near to and adjoining the said land, whereby the said land and the said foundations of the said house and outbuildings sank, swagged and gave way, &c.

Pleas. — First: Not guilty. Second: That at the time of the supposed grievance the plaintiff did not of right enjoy, nor ought of right to enjoy, the said foundations of and supporting the said house and outbuildings.

At the trial, before *Byles, J.*, at the last Stafford Assizes, it appeared that the plaintiff was the owner of a house and outbuildings, situate to the east of a lane called Bill Hay Lane, but not adjoining to it, inasmuch as a garden and lawn, belonging to another owner, lay between the plaintiff's premises and Bill Hay Lane, and adjoined them on the opposite sides. The plaintiff's house had been built in 1834 on solid ground. Between 1828 and 1831 coal had been gotten by one Jesson from under that part of the garden and lawn which adjoined the lane, but not up to the plaintiff's premises. Ribs and pillars of coal were at that time left to support the surface. In 1838 Jesson began to work the coal on the west side of Bill Hay Lane, leaving a rib of coal against the lane. In 1846 "crownings in" took place in the lawn and garden. In working the thick coal in Staffordshire, it is the practice to get out a certain quantity of coal in the first instance, leaving what are called ribs, to prevent water and air from coming in from adjoining mines,

and of the character complained of. Otherwise expressed, the injury complained of, in order to be barred by a prescriptive right, must have been continued in substantially the same way, and with equally injurious results, for the entire statutory period." *MITCHELL, J.*, in *Matthews v. Stillwater Gas & Elec. Light Co.*, 68 Minn. 493, 496.

See also on noise, *Keeble v. Hickeringill*, 11 East, 574 n.; *Soltau v. De Held*, 2 Sim. (N. S.) 183; *Davis v. Sawyer*, 133 Mass. 289; *Rogers v. Elliott*, 146 Mass. 349.

and pillars to support the surface. The pillars are eight yards square, the intervals between them eight yards in width. When the coal is worked out between the pillars, the mines are left for some years that the earth may settle. During this time it sometimes happens that in some places droppings of earth continually take place from the roof between the pillars, and by degrees the surface falls in, causing a basin-shaped hollow on the surface; this is called a "crowning in." After the soil has become consolidated the mine is again worked, and the ribs got out as far as possible. In 1854 the defendant, who was then the owner of the mines on the west side of Bill Hay Lane, began to work out the ribs and pillars left by Jesson in 1838. The nearest of the defendant's workings were at a distance of thirty-five yards from the plaintiff's house. In 1857 the plaintiff's house began to crack. The plaintiff's witnesses alleged that the damage was caused by the getting of the ribs and pillars by the defendant on the west side of Bill Hay Lane. There was evidence that the defendant knew of the excavations on the east side of the lane.

The learned judge asked the jury, — First, was the sinking of the plaintiff's premises caused by the defendant's workings, either alone or in conjunction with anything else? The jury answered this question in the affirmative.

Secondly. — Would the same damage have arisen from the defendant's workings if the ground had been left solid on the east side of Bill Hay Lane? The jury found that it would not; but that some of the damage would have happened.

Thirdly. — Did the plaintiff enjoy, as of right, support from the defendant's ribs and pillars? His Lordship said that the plaintiff's house was built in 1834. The excavations on the east side of Bill Hay Lane were finished in 1831, and therefore existed for twenty years when the defendant's workings began in 1854. If the defendant knew of the excavations on the east of Bill Hay Lane, the plaintiff had enjoyed as of right for twenty years the support of the defendant's soil. The jury found that the defendant did know of the excavations.

Fifthly. — Did the land fall from the superincumbent weight of the house, or would it have fallen if no house had been erected upon it? The jury found that the land would have fallen in the same manner whether there had been a house upon it or not.

Sixthly. — If the damages arose partly from the defendant's workings, and partly from the old workings to the east of Bill Hay Lane, how much was occasioned by the defendant's workings, and how much by the old workings? The jury found £300 damages, £250 occasioned by the defendant's workings, and £50 partly by the defendant's workings and partly by the old workings to the east of the lane. Upon these findings the learned judge directed a verdict to be entered for the plaintiff for £300, reserving leave for the defendant to move to enter a verdict or to reduce the damages to £250; neither party to be at liberty to bring error.

Huddleston, in Michaelmas Term, obtained a rule to show cause why the verdict should not be entered for the defendant upon the plea of not guilty, so far as relates to the allegations that the defendant worked carelessly and negligently, on the ground that those allegations were not supported by the evidence; and on the second issue, on the ground that the plaintiff had not enjoyed, as of right, for twenty years, the right of support for his buildings from the ribs and pillars of coal worked by the defendant; that there was no evidence nor was it found by the jury that the defendant, or those under whom he claimed, knew for twenty years that the plaintiff's premises were in fact supported by the mines worked by the defendant; or why the damages should not be reduced to £250, on the ground that as to £50, the damage was not occasioned by the defendant's working, but by the "crownings in" on land adjoining the plaintiff's premises; or why a new trial should not be had on the ground of misdirection, namely, that the learned judge should have directed the jury that no right of support from the ribs and pillars of coal west of Bill Hay Lane worked by the defendant was gained for the plaintiff's buildings, unless the defendant, or those under whom he claimed, knew for twenty years that, in consequence of the excavated state of the mines east of Bill Hay Lane, the plaintiff's buildings were in fact being supported by the said ribs and pillars, and that there was no evidence of such knowledge, and that, as the plaintiff did not establish a right of support for his buildings from defendant's ribs and pillars, the damages were excessive in respect of any supposed injury to the plaintiff's land.

Gray and Scotland now showed cause.

Phipson and Dowdeswell (with whom was *Huddleston*), in support of the rule.

POLLOCK, C. B. This rule must be discharged. As to the right of support for the house *quâ* house, if necessary to decide it, which it is not, I should be disposed to hold that the plaintiff was entitled to the support of the surrounding ground. But the moment the jury found that the subsidence of the land was not caused by the weight of the superincumbent buildings, the existence of the house became unimportant in considering the question of the defendant's liability. It is as if a mere model stood there, the weight of which bore so small a proportion to that of the soil as practically to add nothing to it. The plaintiff's complaint resolves itself into this, that the land was injured; and the house was considered by the learned judge solely with reference to the amount of the damages. Then it is said that the same amount of damage would not have happened if the land to the east of Bill Hay Lane had been left solid. If the excavation to the east of Bill Hay Lane contributed to the damage, did the defendant know that this ground was riddled by mines? The jury found that he knew it. He knew there was greater danger of injuring the plaintiff by sinking on the west side of the lane than there would have been if the ground on the east side had been left solid, and he ought to have known that the excavated ground was

less powerful and gave less support on that side. He is therefore responsible for the whole of the damage. The objections upon which the rule was founded are answered in every part, and the rule must therefore be discharged.

MARTIN, B. I am of the same opinion. The rule was obtained on several grounds. First, that there was no evidence of negligence on the part of the defendant. It was admitted that this fails because, if the plaintiff was entitled to the support of the defendant's land and was deprived of it, the absence of negligence is immaterial. Secondly, that the support was not enjoyed as of right. The mode in which the question was dealt with shows that this issue was properly decided in favor of the plaintiff. There was ample evidence that the defendant knew the state of the plaintiff's land. There is no ground for reducing the damages. The house was lawfully on the plaintiff's land, and was damaged by the unlawful act of the defendant. As to the point that no right of support by the defendant's ribs and pillars had been acquired, unless the defendant knew that in consequence of the excavated state of the plaintiff's ground his buildings were in part supported by these ribs and pillars, and there was no evidence of such knowledge, I think there was ample evidence. I do not wish to consider that as a criterion of the defendant's liability; but it was so treated.

WATSON, B. When the report of the learned judge was read, it became clear that there was no ground for this rule. It was alleged that there was no evidence that the defendant had worked carelessly; but the meaning is that he worked carelessly with reference to the rights of the plaintiff. The defendant desired to raise a question as to the right of support by adjacent land. When a great weight is put on land which immediately causes a pressure upon the adjoining land, a nice question sometimes arises; but here everything was determined, by the finding of the jury, that the accident was not caused by the weight of the building, and that this weight had no effect in causing the subsidence of the soil. As to the damages, the jury found that the defendant, knowing the state of the plaintiff's land, worked his own mines, and so caused the injury. There is, therefore, no ground for reducing the damages.

CHANNELL, B. The learned judge left certain questions to the jury. The findings, which are not impeached, taken in connection with the questions, appear to me to leave no room for the argument attempted to be raised on the part of the defendant.

*Rule discharged.*¹

¹ See *Wilms v. Jess*, 94 Ill. 464.

"This right (of lateral support) does not prevent one landowner from removing the soil, and withdrawing the natural support, provided he furnishes the adjoining landowner with an equivalent support, as by a wall or other structure, and does no actual damage to the adjoining land. FIELD, J., in *Adams v. Marshall*, 138 Mass. 228, 238.

SMITH v. THACKERAH.

COMMON PLEAS. 1866.

[Reported L. R. 1 C. P. 564.]

DECLARATION that the plaintiff was possessed of certain land, and the land received lateral support from certain land adjoining thereto; and the defendants dug and made on this adjoining land an excavation or well near to the land of the plaintiff, and the defendants thereby, and for want of keeping and continuing the sides of the well shored up, or otherwise preventing the consequences hereinafter mentioned, wrongfully deprived the land of the plaintiff of its support, whereby the land of the plaintiff sank and gave way, and divers walls, buildings, and premises of the plaintiff on the land sank and were damaged, whereby the plaintiff was put to great expense, &c.

Pleas, Not guilty, and Not possessed.

At the trial before *Erle*, C. J., at the last Surrey Spring Assizes, it was proved that the plaintiff was possessed of a piece of land on which a building had been recently erected, and that the defendants, who were neighboring landowners, dug a well on their own land near to that of the plaintiff, and afterwards filled up the well with such loose earth that the ground round it sank, and the plaintiff's building was injured, causing damage to the amount of £15.

The jury found, in answer to questions by the Chief Justice, that the land of the plaintiff would have sunk if there had been no building on it, and that some particles of sand from it would have fallen on to the defendants' property, but that the plaintiff would have suffered no appreciable damage.

A verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for such sum under £15 as the court should direct, on the ground that the facts proved at the trial entitled the plaintiff to a verdict without proof of any pecuniary damage.

Robinson, Serjt., having obtained a rule *nisi*, pursuant to the leave reserved,

Joyce showed cause.

Robinson, Serjt., and *Joseph Sharpe*, in support of the rule.

ERLE, C. J. I am of opinion that this rule should be discharged. There is no doubt that a right of action accrues whenever a person interferes with his neighbor's rights, as, for example, by stepping on his land, or, as in the case of *Ashby v. White*, 1 Sm. L. C. 5th ed. 216, interfering with his right to vote, and this though no actual damage may result. But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbor; and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount. A person may build a chimney in

front of your drawing-room, and the smoke from it may annoy you, or he may carry on a trade next door to your house the noise of which may be inconvenient; but unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is in itself a lawful act. In the case of *St. Helen's Smelting Company v. Tipping*, 11 H. L. C. 642; 35 L. J. (Q. B.) 66, in which the defendant had set up some chemical works, the House of Lords held that, if the noxious vapors did not cause material damage to the plaintiff, he had no cause of action. In the present case the digging the well and filling it up again were in themselves perfectly lawful acts, and the jury have found that they did no sensible damage to the plaintiff, and he has therefore no right of action.

BYLES, J. I am of the same opinion. In actions for a trespass the trespass itself is a sufficient cause of action. But in actions for indirect injuries like the present, the judgment of the House of Lords in *Bonomi v. Backhouse*, 9 H. L. C. 503; 34 L. J. (Q. B.) 181, shows that there is no cause of action if there be no damage, and I cannot distinguish between no appreciable damage to the land in its natural state and no damage at all.

MONTAGUE SMITH, J. I am of the same opinion. The mere subsidence of the surface of the soil is not necessarily an injury, and we are bound by the verdict of the jury, who found that in fact no appreciable damage would have occurred if these new buildings had not been on the land.

*Rule discharged.*¹

BIRMINGHAM v. ALLEN.

CHANCERY DIVISION AND COURT OF APPEAL. 1877.

[Reported L. R. 6 Ch. Div. 284.]

THIS was an action by the Corporation of Birmingham, who were the owners of gasworks called the Swan Village Gasworks, to restrain the defendants, T. H. Allen and T. E. Holden, who were proprietors of Swan Farm Colliery, in the neighborhood of the gasworks, from working their coal in such a manner as to cause subsidence of the surface of the plaintiffs' land.

The plaintiffs purchased the gasworks from the Birmingham and Staffordshire Gaslight Company in the year 1875.

The gas company purchased the land on which the works were erected, together with the minerals under the same, in the year 1824. They afterwards purchased the minerals under various pieces of land adjoining their property, for the purpose of preventing the surface of their own land from being shaken or disturbed. Among others they purchased, in 1872, the minerals under a piece of land belonging to Messrs.

¹ See Gale, *Eas.* (7th ed.) 357 and note.

Pershore & Gregory which adjoined the western boundary of the gasworks. The defendants' colliery lay to the west of this piece of land, to which it adjoined, so that the piece of land lay between the properties of the plaintiffs and the defendants.

The seams of coal under the district were as follows: The Brooch Coal, 8 ft. 9 in. thick, about 90 yards from the surface.

The Thick Coal, 28 ft. 9 in. thick, about 156 yards from the surface.

The Heathen Coal, 8 ft. 6 in. thick, about 156 yards from the surface.

The New Mine Coal, 5 ft. 6 in. thick, about 185 yards from the surface.

The Thick Coal under the piece of land purchased by the gas company in 1872 had been worked out more than thirty years before they purchased it, and the superincumbent earth was propped by pillars in the usual way.

The Thick Coal under the gasworks had not been worked out when the company purchased the site in 1824; but in the year 1834 they granted the Thick Coal under a small portion of the surface to Messrs. Bagnall & Haynes, who worked it out. Some of the area thus granted was exactly under the retorts of the gas company.

The defendants were now engaged in working the lowest vein, or New Mine Coal, under their land. They worked from west to east, and in doing so approached within a few yards of the western boundary of land purchased by the gas company in 1872.

The plaintiffs claimed that the working of the New Mine Coal by the defendants had already caused a subsidence of the surface of their land and the buildings thereon erected, and would, if persisted in, cause them great injury, and they brought this action for an injunction accordingly.

The defendants pleaded that if any subsidence of the plaintiffs' land had taken place, it had been caused partly by the excavations of Thick Coal under the plaintiffs' own land by the lessees of the gas company, and partly by the erection of buildings within the last twenty years over such excavated portions; and they denied that they were under any liability to the plaintiffs in respect of any injury they had sustained.

Both sides went into evidence at great length. The trial came on before the Master of the Rolls on the 15th of March, 1877, and witnesses were examined on both sides.

The result of the evidence is stated in the judgment of the Master of the Rolls.

Chitty, Q. C., and Beale, for the plaintiffs.

Southgate, Q. C., Ince, Q. C., and Speed, for the defendants.

JESSEL, M. R. I am of opinion that the plaintiffs' case entirely fails. We have had a most careful and, I think, a most exhaustive investigation into the facts, and, as far as I am concerned, I have no doubt upon any of the facts necessary to be decided.

I think it is plain that if the land adjoining the plaintiffs' land had not been undermined, the defendants might work the New Mine seam

as well as the Thick Coal seam up to their boundary. [His Lordship then referred to the evidence on this point.]

Now, looking to this evidence, and considering that it is for the plaintiffs to prove their case, I am of opinion that it is proved satisfactorily that, supposing the land between the plaintiffs' and the defendants' land had remained in its natural state, if the defendants' workings should be prosecuted up to the boundary of their property, they would not, as far as the New Mine is concerned, cause any injury whatever to the plaintiffs' works.

Then there is a second question, which is a question of fact I think I ought to give my opinion upon. Has the working of the defendants' New Mine at all actually injured the plaintiffs' buildings? I am clear it has not. [His Lordship then considered the evidence on this part of the case, and considered that there was no evidence of injury already received.]

Then comes the question, Will it occasion injury? As to that, the evidence is very conflicting. Mr. Cooksey puts the safe distance as 100 yards, and although there is a little variation, the plaintiffs' experts substantially agree in putting the safe distance at 100 yards, or fifty-five yards from the defendants' boundary. The defendants' four experts also substantially agree, and they put it at sixty yards, or fifteen yards from the defendants' boundary.

Here, again, it is for the plaintiffs to make out their case; and it seems to me to be mere surmise on both side. However, I must say, if it were necessary to decide the case on that ground, that it is not proved to my satisfaction that more than sixty yards is required, that is, more than fifteen yards from the boundary.

[His Lordship, after considering certain subordinate questions of fact, continued:—]

I now come to a point of very great difficulty indeed, on which the evidence is in a very singular condition. The plaintiffs themselves, or their predecessors in title, had allowed a portion of their land to be undermined, that is, had allowed coal to be extracted from under that land, and the question was, whether the extraction of that coal in any way interfered with the support of the retort houses. Now the odd part of the matter is, that the experts for the plaintiffs said that it would interfere with the support, and increase subsidence; and the experts of the defendants said it would not. Under these circumstances, I think it is only fair to say that, as against the plaintiffs, they cannot reject the evidence of their own experts, and therefore I must consider that it does affect it to some extent, but, considering the evidence of the defendants' experts, not to a material extent. That is the way that matter appears to me.

Now, having so far dealt with the facts, let me consider the law. As I understand, the law was settled by the House of Lords, confirming the decision of the Court of Exchequer Chamber in the case of *Backhouse v. Bonomi*, 9 H. L. C. 508, that every landowner in the kingdom

has a right to the support of his land in its natural state. It is not an easement: it is a right of property. That being so, if the plaintiffs' land had been in its natural state, no doubt the defendants must not do anything to let that land slip, or go down, or subside. If they were doing an act which it could be proved to me by satisfactory expert evidence would necessarily have that effect, I have no doubt this court would interfere by injunction on the ground upon which it always interferes, namely, to prevent irreparable damage when the damage is only threatened. Of course they must have a much clearer and much stronger case to call for the interference of this court by injunction where the damage is merely threatened and no damage has actually occurred, than when some damage has actually occurred, because in the one case you have no facts to go by, but only opinion, and in the other case you have actual facts to go by. If some damage has occurred, it makes it manifest and certain that further damage will occur by reason of the prosecution of the works.

Now in this case, if it stands at all, it may well stand merely on opinion evidence, which would be sufficient ground for interference if all the experts agreed and the court were satisfied that damage had occurred; and I think when I compare the evidence of these various experts, I must take it for this purpose as proved that if the defendants work within fifteen yards of their boundary, and in their New Mine Coal, damage, and serious damage, will accrue to the plaintiffs' buildings. But the question I have to decide is whether in law that entitles them to an injunction. I think it does not. In this case it is true the plaintiffs or their predecessors acquired the mineral area, and acquired some of the land after the Thick Coal had been worked out and not before; but for the present purpose I lay out of consideration the fact of their ownership of anything, and I will treat the case as if the portions under which they possess the minerals, and the land so subsequently acquired, did not belong to them, and it appears as the result of the evidence that if that Thick Coal had not been extracted from under these portions of land, the intended operations of the defendants would certainly not cause any substantial injury.

But it is said that, inasmuch as these operations have occurred in what I will call the intervening land, and have thereby weakened the support, it will entitle the plaintiffs to prevent the owners of the land on the other side of this intervening land from working their mines in the way they could otherwise have worked them. But the first question one asks is, Why? Why should the act of the intervening owner, that is, the owner of the intermediate land, deprive men of their rights to their mines? It strikes one at once as a most extraordinary proposition. The act of the intervening owner for this purpose is rightful as regards the mine-owners whose mines are asked to be confiscated, for that is what it comes to. If they cannot work them they are confiscated. The plaintiffs ask for the confiscation of their property, not because they have done any wrong, for they have done no wrong — not because the

intervening owner has done any wrong, for he only worked his mines, and when he worked them he occasioned no injury to the person who owned the property on the other side; but it is said that inasmuch as he has taken out his coal first, the defendants are deprived of the right of getting their mines. I say it is a startling proposition, and one which appears to me so unfounded in reason that I should be very loth indeed to believe it was founded in law.

Now, what is the right of the adjoining owner? As I said before, it is to the support of his land in its natural state — support by whom? The judges have said, "Support by his neighbor." What does that mean? Who is his neighbor? It was contended that all the landowners in England, however distant, were neighbors for this purpose if their operations in any remote degree injured the land. But surely that cannot be the meaning of it. The neighboring landowner to me for this purpose must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no rights beyond it, and therefore it seems to me that he is my neighbor for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable and of such an unsolid character that you would want a quarter of a mile of it. But whatever it is, as long as you have got enough land on your boundary, which left untouched will support your land, you have got your neighbor's land whose support you are entitled to. Beyond that it would appear to me you have no rights.

Well, that being so, it is clear upon the evidence that the intervening portions of land between the boundary of the plaintiffs' and the boundary of the defendants' land was sufficient in its natural state for the support of the plaintiffs' building. Therefore it appears to me that the plaintiffs have no rights as against the landowners on the other side of that intervening space, and that they acquire no rights whatever the owner of the intervening land may have done; and, if the act of the intervening owner has been such as to take away the support to which the first landowner who complains is entitled, then, for whatever damage occurs from the act which he has done, the first owner may have an action, but an action against the intervening owner, not an action against the owner on the other side; and it appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever originally rested, who was under no liability whatever to support the plaintiffs' land, should have that liability thrown upon him without any default of his own, without any misconduct or any misfeasance on his part. I cannot believe that any such law exists or ever will exist. It appears to me, therefore, that the plaintiffs are not entitled to damages for the acts of the defendants, and that the only order I ought to make is to dismiss the action with costs.

From this decision the plaintiffs appealed. It was admitted on the appeal that if the land lying between the plaintiffs' and defendants' land had remained in its natural condition, the present works of the defendants would not cause any injury to the surface of the plaintiffs' land; but that in its present condition the defendants could not work nearer than fifteen yards to their boundary without endangering the surface of the plaintiffs' land. It was also admitted that the support of the surface on which the retort houses were built was not appreciably diminished by the works of the plaintiffs' predecessors in title. The case came before the Court of Appeal on the 26th of June, 1877.

JAMES, L. J. I am of opinion that the judgment of the Master of the Rolls ought to be affirmed. It has been conceded in the course of the argument that this is, at all events, in fact, whatever it is in principle, an extension of the liability of mine-owners beyond anything for which there is an express authority in any decided case, that is to say, to a case in which the owner of the mines is not the adjoining owner *de facto* to the person whose property is alleged to have been injured; and it is also conceded for the purposes of the argument, and upon the facts of the case, that if the whole of the intervening land, to whomsoever it had belonged or may belong now, had been left in a state of nature, there would have been in that state of nature a sufficient support for the land of the plaintiffs so as not to have imposed any burden upon the defendants, or to have caused what the Master of the Rolls has called a confiscation of the defendants' mineral property.

I agree with the Master of the Rolls that it seems a very startling thing to say that a man who has got a property in valuable mines can be deprived of those valuable mines because some one else between him and somebody else, a third person, has been doing something with his property. Whether you call it an easement or a natural right incident to property, or a right of property, it seems to me that those are only different modes of expressing the origin of the right, and do not express any difference in the right itself. Whatever it be, there must be, whether you use those terms or not, the idea and the substance of a dominant and servient tenement; and it does seem to me rather startling to find that the servient tenement can have its servitude or obligation increased by the act of the owner of the dominant tenement, or by the act of a third person intervening between the owners of the dominant and servient tenements. In all the cases the terms "adjacent," "neighboring," and "neighbor" have been used, and I think that not immaterial. It has always been considered as the right of the adjacent owner, or the right of a subjacent owner; it has always been considered as the right of a man against his neighbor. These are the terms which are always expressed in all the cases. As the Master of the Rolls in this case has pointed out, it does not necessarily apply to a case where the adjacent owner is the owner of a mere strip of land not affording support; and he has, therefore, endeavored to define, and I think he has succeeded in defining, what adjacency and

neighborhood mean in these cases. He has said, using a very felicitous expression, that that is the adjacent land, that is the neighboring property, which in extent would in the natural state of things have afforded the requisite support to the dominant tenement. I see no reason to dissent from that; there certainly is no authority which would entitle me to dissent from that proposition, and I cannot, upon principle, find any reason for extending the liability to an owner of some land beyond the zone which is so described. It appears to me really that if that were not so, and if the thing were to be determined exactly as the thing stands, that the moment the alleged damage is done, or the alleged damage is apprehended, there is no distinction in principle whether the intermediate acts which have changed the natural position of the properties are due to the plaintiff himself or to somebody else, because if he has lawfully worked his mines, he would say, "I have done no wrong; I have done nothing that I was not lawfully entitled to do. I have worked out my mines under my own land as far as I might lawfully do so, and having done that I have now a cavity under my land, and I now warn you, my neighbor, that you must not follow my example and work your mines, because if you work your mines in addition to my working my mines you will let down my house or the surface from which I have removed my support,"—thus throwing it entirely upon him. It seems to me that would be included in the result if it were to be tried at the time the thing was done; and that is exactly what we have authority against. Because in the case in the Court of Exchequer, *Partridge v. Scott*, 3 M. & W. 220, as it appears to me, we have a direct authority for saying that where a man has himself diminished the subjacent support of his own land, he has no right of action or complaint against his neighbor whose acts by reason of that previous weakening have caused subsidence of the plaintiffs' soil. That we have authority for. Upon the same principle, it appears to me to follow, as I have pointed out, that if somebody, not the plaintiff or the defendant, has intervened and destroyed that which was the natural and legitimate support of the plaintiffs' property, that is to say, that portion of the neighboring land which in a state of nature did exist for the purposes of support, no further consequence would arise to the prejudice of the owner of the further piece of land than would have arisen in the case of the plaintiff doing it himself.

I am of opinion, therefore, that the Master of the Rolls' judgment is right, and must be sustained, and that the appeal must be dismissed, with costs.

BAGGALLAY, L. J. This appeal has been argued, and I think it has been conveniently argued, upon certain admissions or assumptions which limit the scope of the pleadings. According to the pleadings, the plaintiffs' land consists of five several properties adjacent to each other, colored with five different colors, which need not be particularly specified, and an injunction is asked to restrain working by the defendants in such a way as to injure, by subsidence or otherwise, any portion

of those five several lands, but the question has now been limited to the consideration of the land on which the retort houses are erected. It has been agreed also that certain conclusions which the Master of the Rolls arrived at upon the facts of the case shall, for the purpose of the argument, be treated as established. One of those conclusions of fact was that if the land intervening between the plaintiffs' land in question and the land of the defendants had remained in its natural state, the defendants might have worked up to their boundary without doing any injury at all to the land. Another of the conclusions of fact was, that assuming the lands to be as they are at present, then the defendants cannot work nearer than within fifteen yards of the mineral boundary between the two properties without causing serious damage to the plaintiffs' buildings; and a third admission is this — and I think it is an important one — that the support of the retort houses has not been in any way appreciably diminished by the working of the plaintiffs themselves under the land on which they are erected.

In this view of the case the suggested injury is, that by the working of the coal measures of the defendants, and by means of the primary subsidence or falling in of the lands between the defendants' land and the plaintiffs' land, which lands are also, for the purpose of argument, assumed to have belonged to third parties, injury will be occasioned also to the plaintiffs' land. Now it appears to me that when once you have arrived at the conclusions and admissions of fact to which I have just alluded, you have a case on which there can be no possible question. It seems to me to be quite contrary to all principle and authority to say that, by reason of the working by the defendants upon lands which are not adjoining lands to the land of the plaintiffs, and which, if the intermediate lands had remained in their natural state, would not have afforded support to the plaintiffs' land, there can be a right of action against the defendants. It appears to me that in the various cases, and they were all cited, I think, and discussed in the case of *Bower v. Peate*, 1 Q. B. D. 321, the very essence of the thing is that the land should be adjacent; that is, adjacent in the sense defined by the Master of the Rolls.

BRETT, L. J. It appears to me strange, but I believe it to be the truth, that there is no authority on the particular point that we have to determine, and that it has therefore to be determined for the first time in this case. I assume for the purpose of this case that the land lying intermediate between the defendants' land and that which the plaintiffs desire to protect is in the hands of other persons than the plaintiffs or the defendants, and I assume that if the defendants work under their own lands they will cause damage to the plaintiffs' lands, and I further assume that if the defendants should not work under their land that no damage will occur to the plaintiffs' land, so that in one sense it will be the act of the defendants which will cause the damage to the plaintiffs' land. But then, as against that, I take the finding to be that if there had been no working under the intermediate land, working under the de-

defendants' land would not damage the plaintiffs' land, and it is upon that last finding that I think this case must be determined, because upon that last finding the defendants' land is brought within this proposition, that it is land which in its natural state, and in the natural state of the plaintiff's land and of the intermediate land, would not be necessary as a support to the plaintiffs' land at all. It seems to me to follow from that that if the defendants worked in their own land up to the boundary when there were no workings in either the plaintiffs' land or the intermediate land, their workings would have no effect whatever upon the plaintiffs' land. They would have a perfect right, therefore, under these circumstances, to work up to the limit of their own land. Then can that right of theirs which they have under those circumstances be diminished by any act done either by the plaintiffs or by any one for whose acts the defendants are not otherwise responsible? It seems to me that their right cannot be so diminished. As for their right being diminished by any act of the plaintiffs themselves, I think the reasoning of Baron Alderson in *Partridge v. Scott*, 3 M. & W. 220, is conclusive to show that the defendants' right could not be diminished under such circumstances by reason of anything done by the plaintiffs themselves on their own land. Well, if that be the case with regard to the plaintiffs, and we have authority so far, we have only to go the additional step of saying that the defendants' right shall not be diminished by the act of the intermediate owner—that is, the act of a person for whose action they are otherwise not at all responsible. They could not prevent that owner working in any way he pleased; they had no remedy against him for working in any way he pleased, and therefore, according to the ordinary principles of law, it seems to me their right ought not to be diminished by the acts of that person.

These are the reasons why I think the Master of the Rolls' proposition is a correct one, namely, that the only acts of the defendants in mining for which they can be responsible with regard to adjacent and neighboring owners are works under land which, if it remained in its natural state and the other lands remained in their natural state, would be a support to the land of the person complaining.

I can hardly think that this is a relation of dominant and servient tenements, and would rather, for myself, put it that this is a relation between adjacent owners, which has an attribute which is the same as that which exists in the case of the relation between dominant and servient tenements, and that relation with regard to the reciprocal acts of the parties leads one to the same conclusion as that which we have already arrived at; although, therefore, this is a case of first impression, that is to say, a case in which we have, after the Master of the Rolls, for the first time, to decide what is the proper definition of "adjacent lands," I think the Master of the Rolls has given a very happy definition of it, and one which we ought to accept.

SCHULTZ v. BYERS.

COURT OF ERRORS OF NEW JERSEY. 1891.

[Reported 53 N. J. L. 442.]

THE plaintiffs, Helena Schultz and Valentine Schultz, were the owners of a lot of land in Bayonne, Hudson county, upon which there was a building erected on brick piers set from three feet to three feet and a half in the ground. The defendant, who owned the adjoining land, excavated to the depth of seven feet within three or four inches of the plaintiffs' building, and erected a house thereon. The excavation by the defendant, within the line of his own land, caused the building of the plaintiffs to sink, and it was weakened, cracked and injured.

There was judgment of non-suit, and exceptions, on which errors are assigned.

For the plaintiffs, *W. W. Anderson*.

For the defendant, *DeWitt Van Buskirk*.

The opinion of the court was delivered by

SCUDDER, J. The declaration is framed on the idea that the plaintiffs' land, dwelling-house and building were entitled to support by the adjacent land of the defendant, and that by wrongfully digging away and removing such support the damage complained of was caused, whereby a right of action accrued. A demurrer was filed to this declaration, but it appears to have been waived, and the cause was tried on a plea of the general issue, and proofs. With this form of pleading, leaving the declaration unaltered, there is difficulty in holding the case in court to determine the exact cause of controversy between these parties. But as the court at the circuit heard and decided the cause as if the pleadings were amended to present the issue, and the question is important, it will be considered as it was there tried and decided.

It is almost unnecessary to say that the juxtaposition of lands gives no right of support to buildings erected thereon, unless conferred by grant, conveyance or statute. As this is a case of recent erection of the building alleged to have been injured, the question of prescription, or lapse of time sufficient to infer a grant or conveyance, does not arise, nor has such right ever been conceded in our courts. The principle of the lateral support of lands and buildings was settled in this state by the case of *McGuire v. Grant*, 1 Dutcher, 356 (1856). As to land in its natural condition there is a right to such support from the adjoining land; as to buildings on or near the boundary line, injured by excavating on the adjoining land, there is no right of action, in the absence of improper motive, or of carelessness in the execution of the work. This is the law as established by the cases prior to that decision; it has remained the unquestioned law in this state since that time, and it has been confirmed by many cases since in other courts.

Some of the most recent are very valuable for reference, notably *Gilmore v. Driscoll*, 122 Mass. 199; *Angus v. Dalton*, 6 Ch. App. Cas. 740, L. R. (3 Q. B. Div.) 85, where a most thorough examination of the subject will be found.

Although this law seems to give the owner of a building put upon his own land in a manner most advantageous and sometimes necessary to make it available for his use, especially in a closely built city, but little protection against the choice or caprice of another who may own the adjoining lands, yet it will be observed he is not entirely without protection. Neither can say, "It is lawful for me to do what I will with my own," as has been sometimes loosely stated in discussing this subject, and that it is a man's folly to build near the dividing line between his land and that of his neighbor, for it is more frequently his necessity that compels him to do so. The rights of the parties are equal, and are subject to modification by the conflicting right of each other.

Our statute relating to party walls (Rev., p. 809) shows that in some cases it has been thought necessary to fix authoritatively the mutual concessions and limitations in the rights of adjoining land owners. This statute only applies where the excavation is more than eight feet in depth, while in this case the digging is but seven feet deep, but it is a recognition of the reciprocal right and duty which sometimes grow out of the mere vicinage of property. The maxim *sic utere tuo ut alienum non laedas* is often invoked in such cases, and is of very wide application. In this case the limitation of this principle is, that if the owner of adjoining land would dig down beside the foundation of his neighbor's house, he must exercise his right to do so not carelessly, but cautiously. There was no proof, or offer to prove, at the trial, that the defendant was negligent in digging his cellar, whereby the plaintiffs' house was caused to settle and the walls to crack, beyond the mere fact that this was the result. This result alone was not sufficient, for it may have been caused by defects in the plaintiffs' house. The special ground of complaint is, that it was done without the knowledge of the plaintiffs, and without notice to them, by which they might have been enabled to protect their property. It is argued that the defendant thereby took upon himself the whole risk of injury to the building. The question whether such omission to give notice, under the circumstances stated, is evidence of carelessness in the execution of the work is an important one, and it cannot be said to be definitely settled. The case most frequently cited in this country in favor of requiring such notice is *Lasala v. Holbrook*, 4 Paige, 169, 173 (1838). In this case Chancellor Walworth, while affirming the right of the owner of adjacent land to excavate for improvement on his own land, using ordinary care and skill, without incurring damages for injury to a building supported thereby, says: "From the recent English decisions it appears that the party who is about to endanger the building of his neighbor by a reasonable improvement on his own land, is bound to give the owner of

the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same." He cites *Peyton v. Mayor of London*, 9 Barn. & C. 725; s. c. 4 Man. & R. 625; *Walters v. Pfeil*, 1 Moo. & M. 362; *Massey v. Goyner*, 4 Car. & P. 161.

In *Peyton v. Mayor of London* it was held that the plaintiff could not recover, because the defendant had not given notice of his intention to pull down his supporting house, that not being alleged in the declaration as a cause of the injury. Lord Tenterden says, because of the failure to allege want of notice, the action cannot be maintained upon the want of such notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand, upon which point of law we are not in this case called to give any opinion. In *Massey v. Goyner*, where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundation of a building, it was held he was only bound to use reasonable and ordinary care in the work, and not to secure the adjoining premises from injury.

In *Chadwick v. Trower*, 6 Bing. N. C. 1; s. c. 8 Scott, 1 (1839), it was decided, in the Exchequer Chamber, that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down a wall to give notice of his intention to the owner of an adjoining wall. This case was first considered in 3 Bing. N. C. 334, and cited in 2 Scott N. R. 74 and 5 Id. 119. In the argument, when it was urged that if it be a duty imposed on a party not to do work so incautiously as to injure his neighbor's rights, and it is clearly a want of proper caution to omit giving such notice as may enable the neighbor to take steps for his own security, Parke, B., replied: "The duty of giving notice in such cases seems to be one of those duties of imperfect obligation which are not enforced by the law." But if it be a duty affecting property rights, and the breach causes damage, it would seem that the law must afford a remedy.

In *Brown v. Windsor*, 1 Crompt. & J. 20, Garrow, B., said: "There may be cases where a man altering his own premises cannot support his neighbor's, and the support, if necessary, must be supplied elsewhere. In such case he must give notice, and then, if an injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take due precaution."

There are no later cases, that I have found, in the English courts, which change the rule given in *Chadwick v. Trower*, and that is therefore supposed to be the present law in England relating to this subject, though the cases above cited refer to support by adjoining buildings.

There are very few cases in our country which bear directly on this point. *Shafer v. Wilson*, 44 Md. 268, is most frequently referred to, after *Lasala v. Holbrook*, above cited. It is there said, that notice to one's neighbor of an intention to make a contemplated improvement of property would seem to be a reasonable precaution in a populous city, where buildings are necessarily required to be contiguous to each other, and improvements made by one proprietor, however skillfully conducted,

may be attended with disastrous results to his neighbors, who ought to have the opportunity to protect themselves and property. To the like effect is *Beard v. Murphy*, 37 Vt. 101.

Chancellor Kent, 3 Com. 437, has quoted the case of *Lasala v. Holbrook*, and this has been referred to in *Shafer v. Wilson*, and elsewhere. Washb. Easem. 434, 435; Shearm. & R. Negl. 497; 1 Thomp. Negl. 276, and other text-books, cite these cases, and from such quotations it is impossible to determine how far the requirement of notice has passed into the general law of the courts in this country.

None of these cases are of binding authority in this court, and in a case of doubt, like this, we should seek for that result which is most reasonable and just. Where the danger of loss in doing a legal act is not equally balanced, we should lean to that side which most needs protection. Here a mere notice, which can cause but little trouble to one who is honestly exercising his right of excavating his land next to his neighbor's house, may enable the receiver of notice to shore or prop his walls to prevent its falling, or it may lead to some arrangement by which neither will be injured. It is more than a mere neighborly courtesy to give such notice, because it involves the right of one man to assert his right, regardless of the injury he may cause to his neighbor without such warning. The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or, if there be difficulty in finding or serving it on him, then it may be given to the tenant or occupant who is interested in protecting the property. Where it can be shown that such owner had knowledge of the improvement that was about to be made, it would not be necessary to prove a formal notice given to him.

In this view of the case, there was error in rejecting the evidence which was offered to show that the defendant gave no notice to the plaintiffs of his intention to excavate the land adjoining the house of the plaintiffs, and the judgment will be reversed.¹

¹ See also *Austin v. Hudson River R. R. Co.*, 25 N. Y. 334; *Shafer v. Wilson*, 44 Md. 268. In California notice is required by statute. *Aston v. Nolan*, 63 Cal. 269.

In *Gildersleeve v. Hammond*, 100 Mich. 431 (1896), it was held that where the landowner who makes the excavation fails to take reasonable precautions to preserve his neighbor's soil in its natural state, he is liable for the injury to both the land and the superstructure. In *Gilmore v. Driscoll*, 123 Mass. 190, where no negligence was alleged, recovery was limited to the damage to the soil only, not including injuries to fences and shrubs. *Gilmore v. Driscoll* was followed in *McGettigan v. Potts*, 149 Pa. 155. It is sometimes said that the measure of damages is the "diminution in value of the plaintiff's lot by reason of the acts of the defendant." *McGuire v. Grant*, 25 N. J. L. 356. In *Schultz v. Bower*, 64 Minn. 123, the court laid down the rule more clearly. The measure of damages is not the cost of restoring the land to its former condition. *McGuire v. Grant*, *supra*; *Gilmore v. Driscoll*, *supra*. On damages for withdrawal of subjacent support, see *Wilms v. Jess*, 94 Ill. 464.

On the right to withdraw the support afforded by water, see *Elliot v. N. E. R. Co.*, 10 H. L. C. 333; *Popplewell v. Hodgkinson*, L. R. 4 Ex. 248; *Horner v. Watson*, 79 Pa. 242; Banks, Support, Appendix (A).

The question of the right to withdraw the support of semi-fluid substances was

[MAGIE, J., agreed with the majority opinion, that the excavating owner is liable for injuries occasioned to a neighboring building by his negligence in digging; but he was of opinion that no duty to give notice of the excavation was imposed by law.]

considered at length in *Jordeson v. Sutton Gas Co.*, [1899] 2 Ch. 217; *Trinidad Asphalt Co. v. Ambard*, [1899] A. C. 594; and *Cabot v. Kingman*, 166 Mass. 408.

The doctrine of lateral support does not apply to lands used for hydraulic mining. *Hendricks v. Spring Valley Mining Co.*, 58 Cal. 190.

The right of action for the withdrawal of support accrues, not when defendant makes the excavation, but when the land of plaintiff falls. Hence, the Statute of Limitations begins to run at the last-mentioned time; *Backhouse v. Bonomi*, 9 H. L. C. 508; and when there are successive subsidences due to one digging, the statute runs from each subsidence as it occurs. *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. D. 125; 11 Ap. Cas. 127. But see *Noonan v. Pardes*, 200 Pa. 474.

Lamb v. Walker, 8 Q. B. D. 889, in which it was held that prospective as well as present damages are recoverable in one action, was overruled in *Mitchell v. Darley Main Colliery Co.*, *supra*; and see *Crumbie v. Wallsend Local Board*, [1891] 1 Q. B. 503. Cf. *Great Laxey Mining Co. v. Clague*, 4 Ap. Cas. 115 (P. C.).

The liability rests upon him who makes the excavation, and not upon his successor in title who owns the excavated land at the time of the subsidence of plaintiff's land. *Hall v. Duke of Norfolk*, [1900] 2 Ch. 498.

As to the jurisdiction of equity to restrain excavating, see *Morrison v. Latimer*, 51 Ga. 519.

SUBJACENT SUPPORT.—" . . . Where the mineral estate is severed from the surface by a conveyance, the lower estate passes to the grantee subject to the servitude imposed upon it by nature for the support of the surface. The surface owes to the lower estates an easement or servitude for access. The lower estates owe to each other and to the surface an easement for support. The owner of the mine must leave enough of the mineral in place to answer the purposes of support for the surface unless the owner of the surface has released his right to support. . . . This right of support may be released by apt words in a deed of conveyance; *Scranton v. Phillips*, 94 Pa. 15; but such release will not be implied from language that does not necessarily import it. . . . The grant of a mineral estate, or of the right to mine, is a grant of the right to penetrate the earth in search of the mineral stratum, and, when found, to quarry and remove the mineral in a proper manner. Such injuries as are the necessary result of this process do not afford a cause of action to the owner of the surface. If his springs are drained or his well destroyed as the natural result of the excavation made to reach and remove the coal, he has no right to complain. But a sale of all the coal under a tract of land is not in terms nor by necessary implication a release of the right to surface support any more than the sale of the first story of a building, two or more stories in height, would be a release of the floor so sold from its visible servitude to the remainder of the building." WILLIAMS, J., in *Robertson v. Youghiogheny Coal Co.*, 172 Pa. 566, 571.

And see *Humphries v. Brogden*, 12 Q. B. 739; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; *Burgner v. Humphrey*, 41 Ohio St. 340. Cf. *Aspden v. Seddon*, L. R. 10 Ch. Ap. 394.

In *Hilton v. Earl Granville*, 5 Q. B. 701, it was held that a right in the mine-owner to let down the surface without making compensation could not be claimed by custom or prescription. See *Bell v. Love*, 10 Q. B. D. 547, 561; *Banks*, Support, 18-17; *Horner v. Watson*, 79 Pa. 242.

In some jurisdictions there are statutory regulations concerning excavating *McMillen v. Watts*, 27 Ohio St. 306; *Ketcham v. Newman*, 141 N. Y. 205.

SECTION III.

WATER.

A. *Streams.*

SHURY v. PIGOT.

KING'S BENCH. 1626.

[Reported 3 Bulst. 339.¹]

IN an action upon the case, for stopping of a watercourse, which had used to have its current from such a place, through such a place, and so to come into the plaintiff's yard, and there to fill and supply a pond with water, for the necessary watering of his cattle, the defendant hath erected a stone wall, and so hath stopped this, that the plaintiff wanted his water, and was by this damnified.

The defendant pleaded in bar, a unity of possession in the land of the house, and place to which, and of the land through which, and of other land, of which, &c.

The only question moved, and insisted upon was, whether this unity of possession will extinguish this watercourse, or not.

This case was argued at the bar, and much debated, and for further argument, the same was adjourned to another time.

Afterwards (S.) Termin. Mich. 2 Car. R. B. R. this case was moved again, and urged, that by this unity of possession, the watercourse is not extinguished; and for this purpose, Coke, 4 pars., *Terringham's Case*; 14 H. 4, fol. 7, profit appender extinct by unity; 21 E. 3, fol. 2, a way extinct by unity; 35 H. 6, fol. 55, 56, a warren not extinct by unity; he may hawk in his own land, 16 Eliz. Dyer. fol. 326; 13 Eliz. Dyer. fol. 295; 11 H. 7, fol. 25, the case of the gutter not extinct by unity, as it was urged; Terminum. Hillar. 36 Eliz. B. R. Rott. 1332, a case between *Herneden* and *Crowch* was urged, that service of enclosure, extinct by unity; and 39 Eliz.; *Harrington's Case* was urged, in which it was adjudged, that service of enclosure shall be extinct by unity of possession, and not to be afterwards revived.

Hillar. 4 Jac. B. R. *Jourden* against *Attwood*, the case of a way adjudged to be extinct by unity, as it was urged, and not to be revived; 24 E. 3, fol. 25, common extinct by unity.

11 H. 4, fol. 5, a way extinct by unity.

DODDERIDGE, J. If J. have a mill, and a watercourse unto it, he sells the land, he shall not stop the water, being matter of necessity, and not like unto the case of the way; therefore not to be extinct by unity, because of necessity, and the same hath a continual running.

The reason of the case of enclosure urged is, because the prescription

¹ s. c. sub nom. *Sury v. Pigot*, Pop. 106, at greater length.

there was interrupted, and therefore all gone, and extinct; and so it was adjudged, 3 Jac.

The whole court at this time seemed to be clear of opinion, that the watercourse here, was not extinct, by the unity of possession, there being a great difference between this case and the case of the way.

WHITLOCK, J. The course of a spring, is a natural course and current, and to stop this, may be a nuisance to the Commonwealth, and a private wrong.

Afterwards, this case was argued at large by all the four judges (Termin. Mich. 2 Car. R. B. R.), who all agreed in opinion, that judgment ought to be given for the plaintiff, and that the watercourse in this case is not extinct, by the unity of possession.

1. WHITLOCK, J. There is a difference between a way, a common, and a watercourse. Bracton, lib. 4, f. 221, 222, calls them *servitutes prædiales*, these which begin by private right, by prescription, by assent, as a way common, being a particular benefit, to take part of the profits of the land; this extinct by unity, because the greater benefit shall drown the less; a watercourse doth not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted.

2. JONES, J. This watercourse is not extinct by the unity of possession, the same being a thing which ariseth out of the land, and no interest at all, by this claimed in the land, but *quod currere solebat*, this way, and so to have continuance of this.

3. DODDERIDGE, J. Agreed herein, that this watercourse is not extinct by the unity of possession.

1. Because the nature of this is to be current.

2. Because it is also a thing of necessity, for the watering of cattle, and a thing which of necessity is to have continuance, the same not to be extinct by a unity of possession, as common appendant, to arable land, for cattle of the plough, and because appendant unto ancient arable land, (S) *Hyde* and *Gaigne*, to be only for cattle, (S) *chivalls et beofes*, for to plough the land, and for kine, and sheep, for to compester the land.

As to the case of ways, if they are private ways, they are extinct by a unity of possession, but not so, if they be ways of necessity; as to the church or to the market; and so was Popham's opinion in his time, upon this difference, where a way shall be extinct, and where not, by a unity of possession.

The case of the watercourse is upon the like reason.

11 H. 7, fol. 25. A notable case there of the gutter, the reason there given, because matter of necessity, where one had a gutter running within the tenement of another; both purchase the tenement, the gutter remains, not extinct, this being as necessary as it was before.

2. Another reason may be drawn from the nature of water, the which will naturally descend, and will make a way for its passage, if stopped; it is not possible to have such to be extinct by a unity of possession.

Coke, 4, pars. *Luttrell's Case*, of the *Mill*, and the *Case of the Dye-house*, no mill nor dye-house can subsist without water.

CREW, C. J., agreed herein, that this watercourse is not extinct by the unity of possession; this case differs from the case of the way, and common appendant.

Coke, 4, pars. fol. 38, in *Tirringham's Case*. 3. Resolved, that a common appendant is extinct by a unity of possession; and so it is, of every profit which one hath out of land, and so is 24 E. 3, fol. 25.

The whole court agreed in the principal case, that the watercourse was not extinct by the unity of possession; and accordingly by the rule of the court (the defendant's plea in bar being not good),

*Judgment was given for the plaintiff.*¹

EMBREY v. OWEN.

EXCHEQUER. 1851.

[Reported 6 Ex. 353.]

CASE. — The first count of the declaration stated, that the plaintiffs, before and at the time of the committing of the grievances, were lawfully possessed of certain water grist mills, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse, which had been used to run and flow, and during all that time of right ought to have run and flowed, and still of right ought to run and flow unto the said mills, for the supplying the same with water for the working thereof, save and except at such times and on such occasions when it might be reasonable and necessary to irrigate or water certain closes of the defendant, situate and being on the southern side of the said stream or watercourse, and near to the same, with reasonable quantities of the water thereof. Yet the defendant, intending to injure the plaintiffs, at times when it was not reasonable or necessary to irrigate or water the said closes of the defendant, to wit, on &c., and for divers, different, and other purposes than the irrigating or watering the same,

¹ "The defendants demurred to this complaint for the reason that there was no allegation that the plaintiffs had the right to use the water of the creek or any portion of it. It will be observed that one of the grounds of damage alleged is the mere diversion of the water from its accustomed channel, and appellant's position is, that such action, coupled with the allegations of waste which the complaint contains, is insufficient in law to base a claim of damages upon. . . . But in view of the fact that this right to the uninterrupted flow of water is a part of the land itself, we see no necessity for an allegation that the owner and possessor of the land is also the possessor of this right, because the ownership and possession of the land implies the ownership and possession of the right as well." STILES, J., in *Shotwell v. Dodge*, 8 Wash. 337, 339, 340 (1894).

wrongfully and injuriously cut, dug, made, and erected, in, upon, and near to the sides and banks of the said stream or watercourse, and at a part thereof above the said mills, divers sluices, trenches, channels, aqueducts, and cuts, and kept and continued the same for a long time, &c., and thereby unlawfully and wrongfully diverted and turned divers large quantities of the water of the said stream, &c., out of and away from the said mills, and stopped, prevented, and hindered the water of the said stream or watercourse from running or flowing along its usual course to the said mills, and from supplying the same with the necessary water for the working thereof, as the same of right ought to have done and otherwise would have done; and by reason thereof, the water of the said stream or watercourse, sufficient for the supplying of the said mills, could not run or flow to the same; and the plaintiffs thereby, for want of such sufficient water, could not during that time use the said mills, or follow, use, or exercise their trade or business therein, in so large, extensive, and beneficial a manner as they might and otherwise would have done, &c.

The declaration contained two other counts, which it is not necessary to state.

The defendant pleaded (*inter alia*) first, not guilty; fourthly, to the first count, that one John Jones, before and at the several times when &c., was lawfully possessed of divers, to wit, four closes, situate and being on the bank of, and next adjoining to, and extending to the middle of the said stream or watercourse, to wit, on the north side thereof, and at a part of the said stream or watercourse above the said mills and premises, and which said closes were and are other than the closes on the southern side of the said stream or watercourse in the first count mentioned, and part of which said several closes, whereof the said J. Jones was so possessed as aforesaid, to wit, up to the middle of the said stream or watercourse, hath, from the time whereof the memory of man runneth not to the contrary, been, and at the several times when, &c., was and still is covered with the water of the said stream or watercourse; which said stream or watercourse, from the time whereof the memory of man is not to the contrary, hath been used and accustomed to run and flow in its usual flow, stream, and current over part of and unto and by the said last-mentioned closes, for the watering, fertilization, and general benefit and advantage thereof; that it is at certain intermittent periods and times during certain months of the year, to wit, January, February, and March, the said periods and times being periods and times when the waters of the said stream or watercourse are most abundant, and flow in great quantities and abundance, and are more than sufficient or necessary, and flow in greater quantity than can be used, for the due and proper working of the said mills and premises, right and proper, and fit and necessary and requisite to water and irrigate the first-mentioned closes with the water of the said stream or watercourse, for the more convenient enjoyment and occupation and substantial improvement and cultivation of the said closes, and for rendering the same

fertile and productive and conducive to the public and general weal and advantage. Wherefore the defendant, at the said several times when, &c., the same being reasonable and proper times in that behalf respectively, and during the said months of January, February, and March, and the waters of the said stream or watercourse then being most abundant and then flowing in great quantity and abundance, and being more than sufficient or necessary, and flowing in a greater quantity than could be used for the due and proper working of the said mills and premises, as the servant of the said J. Jones, and by his command, diverted and turned divers small quantities of the water of the said stream or watercourse, the same being reasonable and fit and proper quantities in that behalf, and not more than was necessary and convenient for the purpose of irrigating and watering the first-mentioned closes from and out of the said stream or watercourse, and then caused the same to flow in, over, and upon the first-mentioned closes, and which quantities of water, save and except such small portions and quantities thereof as were necessarily absorbed and used by and in the passing over the said closes, in and by course of the irrigating and watering thereof, as aforesaid, then fell, passed, flowed, and returned into and unto the said stream or watercourse, at divers parts and places above the mills and premises, and before the said stream or watercourse reached and arrived at the same mills and premises, and for the purposes aforesaid, the defendant, at the said several times when, &c., as the servant of the said J. Jones, and by his command, cut, dug, made, and erected in, upon, and near to the sides and banks of the said stream or watercourse, at a part of the said stream or watercourse above the said mills and premises of the plaintiffs, a certain sluice, trench, channel, or aqueduct, and kept and continued the same, and caused the same to be kept and continued, in, upon, and near to the said sides and banks of the said stream or watercourse, and thereby diverted and turned the said small quantities of the water off the said stream or watercourse in manner as in this plea aforesaid, as she lawfully might for the cause aforesaid, *quæ sunt eadem*, &c. — Averment, that the diversion and abstraction aforesaid was not nor is a continuous diversion, but only takes place at intermittent periods, and in manner in this plea aforesaid; and that the quantities of water so absorbed and used as aforesaid, and stopped, prevented, and hindered from running and flowing to the said mills and premises, were and are very small and *inappreciable* quantities, and not more or greater than were and are necessary for the purposes in this plea aforesaid, and that the same were and are not required, and had at no time theretofore been appropriated by the plaintiffs for the purpose of working the said mills and premises, or any other purposes; and that the diverting, turning away, and abstracting, and stopping, hindering, and preventing the same from flowing to the said mills and premises did not at any time cause any damage, hindrance, or impediment to the due, proper, and necessary working and using of the said mills and premises. — Verification.

The seventh and tenth pleas were similar to the fourth, being respectively pleaded to the second and third counts of the declaration.

The plaintiffs joined issue on the first plea, and to the fourth, seventh, and tenth replied *de injuria*. Issue thereon.

At the trial before *Talfourd*, J., at the last Summer Assizes for Montgomeryshire, it appeared that the plaintiffs were occupiers of a water grist mill situate on the banks of the River Rhiew, a mountain stream, in the parish of Berriew, in that county. The defendant Mrs. Owen was the owner of land on both sides of that river above the mill; and this action was brought against her for diverting part of the water of the river, for the purpose of irrigating certain meadows on the northern bank, which were in the occupation of her tenant John Jones. The water was diverted by means of an iron trough or aqueduct placed near a waste weir, from whence the surplus or waste water was carried into the trough or aqueduct, and by it over the river into the main and floating gutters of the meadows, when required for irrigation; at other times such surplus water was discharged from the trough or aqueduct direct into the bed of the river by means of an iron flap or sluice in the middle side of the trough, so constructed as to be opened for the latter purpose at pleasure. A portion of the water was lost by absorption and evaporation in the process of irrigation; the working of the plaintiffs' mill, however, was not in the least impeded; and the quantity thus lost was differently calculated by scientific witnesses on both sides, a witness for the plaintiffs estimating it at four or five per cent, and a witness for the defendant at only one seventh per cent, even in summer. All the witnesses concurred, that there was no *sensible* diminution of the stream by reason of the diversion, that is to say, none cognizable by the senses, and that the amount of loss was ascertainable only by inference from scientific experiments on the absorption and evaporation of water poured out on the soil.

The learned judge, with reference to the first issue, left to the jury the question whether there was any sensible diminution of the natural flow of the water by means of the diversion; and with reference to the other issues above mentioned, he left it to them to say, in the terms of the pleas, whether the quantities of water absorbed and evaporated in the process of the defendant's irrigation were small and *inappreciable* quantities; intimating, however, that he felt great difficulty in fixing a legal meaning on this latter term, but suggesting that it might mean "so inconsiderable as to be incapable of price or value." Both the questions left to the jury having been answered by them in favor of the defendant, the former in the negative and the latter in the affirmative, the learned judge directed that the verdict should be entered on the above issues for the defendant, reserving leave to the plaintiffs to move to enter it for them, with nominal damages.

Welsby, in last Michaelmas Term obtained a rule *nisi* accordingly, and also to enter judgment for the plaintiffs, *non obstante veredicto*, on the fourth, seventh, and tenth issues.

Bramwell and *E. Beavan* showed cause at the sittings after Hilary Term.

Welsby, *Foulkes*, and *Wynn*, in support of the rule.

The judgment of the court was delivered by

PARKE, B. (after stating the pleadings and facts). We are not prepared to say that the learned judge at *Nisi Prius* was correct in his interpretation of the word "inappreciable" when connected with the word "quantity," nor sure that he was not; for the word "inappreciable" or "unappreciable" is one of a new coinage, not to be found in Johnson's Dictionary or Richardson's. The word "appreciate" first appears in our dictionaries in the last edition of Johnson, by Todd, 1827, with the explanation "to estimate," "to value;" and assuming that to be the true meaning, which we suppose it is, the compound adjective signifies that the quantities were not capable of being *estimated* or *valued*, and in that sense the fourth plea was not proved. It is, however, a matter of little importance; for assuming that the word was wrongly explained, the only consequence would be, that a question would arise, whether the fourth issue and the others involving the same terms ought not to have been found for the plaintiffs, a question we need not decide; for if the issue on not guilty remains as it now is found for the defendant, as we think it ought to be, there should be no new trial, if the defendant consents, as she probably will, that the fourth and other corresponding issues should be found for the plaintiffs. This course was adopted in *Stead v. Anderson*, 4 C. B. 836.

The important question is that which arises on the plea of Not guilty, the jury having found that no sensible diminution of the natural flow of the stream to the plaintiff's mill was caused by the abstraction of the water. That the working of the mill was not in the least impeded was clear on the evidence. On that finding we think the verdict was properly ordered to be entered for the defendant.

It was very ably argued before us by the learned counsel for the plaintiffs, that the plaintiffs had a *right* to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a *right*, and, if continued, would be the foundation of a claim of adverse right in that proprietor.

We by no means dispute the truth of this proposition, with respect to every description of right. Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable, as was laid down in the case of *Ashby v. White*, 2 Ld. Raym. 938, by Lord Holt, and in many subsequent cases, which are all referred to, and the truth of the proposition powerfully enforced, in a very able judgment of the late Mr. Justice Story in *Webb v. The Portland Manufacturing Company*, 3 Sumn. Rep. 189. But in

applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them.

The law as to flowing water is now put on its right footing by a series of cases, beginning with that of *Wright v. Howard*, 1 Sim. & S. 190, followed by *Mason v. Hill*, 3 B. & Ad. 304; 5 Id. 1, and ending with that of *Wood v. Waud*, 3 Exch. 748, and is fully settled in the American courts. See 3 Kent's Comm., Lect. 52, pp. 439-445.

The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only; see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.

The right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of *all* the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

It is only therefore for an unreasonable and unauthorized use of this common benefit that an action will lie; for such an use it will; even, as the case above cited from the American reports shows, though there may be no *actual* damage to the plaintiff. In the part of Kent's Commentaries to which we have referred, the law on this subject is most perspicuously stated, and it will be of advantage to cite it at length: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This

is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbor above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbor. Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriores faciat.*"

In America, as may be inferred from this extract, and as is stated in the judgment of the Court of Exchequer in *Wood v. Waud*, a very liberal use of the stream for the purposes of irrigation and for carrying on manufactures is permitted. So in France, where every one may use it, "en bon père de famille, et pour son plus grande avantage:" Code Civil, art 640, note a, by Pailliet.¹ He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused. In the above-cited case of *Wood v. Waud*, it was observed, that in England it is not clear that an user to that extent would be permitted; nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that

¹ See his *Manuel de Droit Français*. Paris, 1838.

which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream, in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not; and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so, it was no infringement of the plaintiffs' right at all; it was only the exercise of an equal right which the defendant had to the usufruct of the stream.

We are therefore of opinion that there has been no injury in fact or law in this case, and consequently that the verdict for the defendant ought not to be disturbed.

The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man; and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing the natural purity of the air; he cannot erect a building, or plant a tree, near the house of another, without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all.

Rule discharged, the defendant consenting that the verdict on the fourth, seventh, and tenth issues be entered for the plaintiffs.¹

¹ "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream

SAMPSON v. HODDINOTT.

COMMON PLEAS. 1857.

[Reported 1 C. B. (N. S.) 500.]

CRESSWELL, J.,¹ delivered the judgment of the court.

In this case, several causes of complaint were brought forward on behalf of the plaintiff, — first, in respect of the diversion of the River Yeo; secondly, in respect of the diversion of a stream called the Back Water; thirdly, in respect of the obstruction and diversion of a stream called the Silver Lake Spring.

In the course of the argument, the court decided all the points that were raised in respect of the two latter cases of complaint, in favor of the defendant; but they took time to consider the question arising on the first.

The result of the facts as to this part of the case appears to us to be as follows, viz., that the plaintiff had immemorially enjoyed the benefit of irrigating certain of his meadows with the water of the River Yeo, subject, however, to the right of the miller at West Mill to detain the water for the use of his mill. Although the natural flow of the river was prevented by the exercise of this right, yet the water was allowed to come down at such times that the plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant, for the purpose of irrigating his own adjacent land, had from time to time diverted the water after it had passed the mill, and before it reached the plaintiff's meadows; and, although the facts stated in the special case do not, in

for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." *Per* LORD KINGSDOWN, in *Miner v. Gilmour*, Moore, P. C. 131, 156.

"Every man has a right to the reasonable use and enjoyment of a current of running water, as it flows through or along his own land, for mill purposes, having a due regard to the like reasonable use of the stream by all other proprietors above and below him. In determining what is such reasonable use, a just regard must be had to the force and magnitude of the current, its height and velocity, the state of improvement in the country in regard to mills and machinery, and the use of water as a propelling power, the general usage of the country in similar cases, and all other circumstances bearing upon the question of fitness and propriety in the use of the water in that particular case." SHAW, C. J., in *Thurber v. Martin*, 2 Gray, 394, 396.

"Where all have a right to participate in a common benefit, and none can have an exclusive enjoyment, no rule, from the very nature of the case, can be laid down, as to how much each may use without infringing upon the rights of others. In such cases, the question must be left to the judgment of the jury, whether the party complained of has used, under all the circumstances, more than his just proportion." LOCKWOOD, J., in *Evans v. Merriweather*, 4 Ill. 492, 496 (1842).

For an example of a small stream held to be subject to the general rules of riparian rights, see *Gillett v. Johnson*, 30 Conn. 180.

As to rights of riparian proprietors where a stream is divided by an island into two channels, see *Warren v. Westbrook Mfg. Co.*, 86 Me. 32 (1893).

¹ The opinion only is given.

our opinion, lead to any certain conclusion, that, by the mere irrigation on the part of the defendant, the quantity of water which ultimately reached the plaintiff's meadows was sensibly diminished, yet the effect was, that the water was detained, by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully.

The question is, whether such a diversion and detaining of the water by the defendant is actionable.

It was contended, on his part, that it was not, because he had a right by law, as a riparian proprietor, to apply the water of the stream to irrigate his adjacent land, provided he did so (as it was admitted he did) in a careful and proper manner.

On the part of the plaintiff, it was denied, generally, that a riparian proprietor has any such right: and it was also contended, that, at all events, in this case the plaintiff had gained a title to the uninterrupted flow of the stream by immemorial enjoyment.

As to the latter proposition, it appears to us that all persons having lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not; and that they may begin to exercise them whenever they will. By usage, they may acquire a right to use the water in a manner not justified by their natural rights: but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. If the user of the stream by the plaintiff for irrigation was merely an exercise of his natural right, such user, however long continued, would not render the defendant's tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water. If the user by the plaintiff was larger than his natural rights would justify, still there is no evidence of its affecting the defendant's tenement, or the natural use of the water by the defendant, so as to render it a servient tenement.¹

¹ See *Harrop v. Hirst*, L. R. 4 Ex. 48.

"With any use or diversion of the water after it has passed his land the upper riparian proprietor, having no ownership in and no longer any rights to it, would have no concern. (The right to forbid the lower owner from backing the water and flooding his land not being here under consideration.) None of his rights would or could be impaired thereby, and without such impairment he would be without injury, and, consequently, without cause for complaint or redress. His right extends no further than the boundary of his own estate. He cannot complain of the mere facts of the diversion of the watercourse either above or below him, if, within the limits of his own property, it is allowed to follow its accustomed channel (*Lux v. Haggin*, 69 Cal. 256). The 'acquiescence' of Cook and his predecessors in interest in the acts of the owners of the Hargrave & Comfort ditch, as declared by the findings, receives this support from the evidence, and no more: With knowledge of these acts they never attempted to interfere with them. But, before one can acquire a right to the doing of an act in which another so acquiesces, the act itself must amount to an in-

But, if the user by the defendant has been beyond his natural right, it matters not how much the plaintiff has used the water, or whether he has used it at all. In either case, his right has been equally invaded, and the action is maintainable.

The question between the parties is thus reduced to this single point: Has the defendant used the water as any riparian proprietor may use it, or has he gone beyond that?

The general principle of law which, in our opinion, may be deduced from the decision of *Embrey v. Owen*, 6 Exch. 353, and the authorities cited by Parke, B. in delivering judgment in that case, is, that every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of other proprietors above or below on the stream.

In the present case, it appears to us, on the evidence, that the detention by the defendant, under the circumstances, of the water of the River Yeo for the purposes of irrigation, was a use of it which, in its character, was necessarily injurious to the natural rights of the plaintiff as the proprietor of land lower down the stream. The effect was obviously the same as if the defendant had placed a bar or weir across the river, and by that means had wholly prevented its natural course for a certain number of hours. And it appears to us that there is neither authority nor principle for contending that such an act can be justified on the ground that it was done for the purpose of improving the adjacent land of the defendant, whether by irrigation or otherwise.

For these reasons, we are of opinion that our judgment must be for the plaintiff as to such part of his complaint as relates to the River Yeo, and, as to the rest of the alleged causes of action, for the defendant.

Judgment accordingly.

M. Smith, Q. C. (with whom were *Kinglake, Serjt., and Barstow*), for the plaintiff.

Butt, Q. C. (with whom were *Slade, Q. C., and Ffooks*), *contra.*

STOCKPORT WATERWORKS COMPANY v. POTTER.

EXCHEQUER. 1864.

[Reported 3 H. & C. 800.]

POLLOCK, C. B. I am about to deliver the judgment of my Brother Channell and myself. My Brother Wilde, being no longer a member of

vasion of that other's rights, and the doing must either have been so long continued as that a prescriptive claim can be supported upon the theory that the acquiescence presupposes a grant, or under such circumstances as will raise an estoppel against the objecting party. But, as the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it had flowed past his boundary, any such use could not work an invasion of his rights, and he was not called upon to protest against it." *HENSHAW, J., in Hargrave v. Cook*, 108 Calif. 73, 77 (1895).

the court, takes no part in the judgment; but it may be satisfactory to the profession to know that he had prepared a judgment founded on the principles which I am about to state.

The plaintiffs bring this action against the defendants for fouling the waters of the River Mersey.

The case is very voluminous, but a recapitulation of all the facts is by no means necessary for the purpose of giving judgment. It is enough to say that the plaintiffs have been in the habit of taking water by means of conduits, &c., from the River Mersey, at a point called the Nab Pool Weir, ever since the year 1858. That the owners of the Woodbank Estate (which estate bounds the river for some distance, including the spot where the Nab Pool Weir is erected, and through which estate the conduits, tunnels, &c., by which the plaintiffs draw the water, pass) have also been used to draw the water at the same place for some years, perhaps it may be conceded for fourteen years, before the year 1858.

So that water has in fact been drawn at that point (it may be taken for the purpose of the argument) for more than twenty years before this suit. That the water so drawn has been used to supply the town of Stockport with water fit for household purposes and has not been returned to the river again.

It further appears that, in 1858, the owners of the Woodbank Estate executed a deed under which the Stockport Waterworks and the use of the several conduits and tunnels, &c., by means of which the water has, during the period aforesaid, been drawn from the river at Nab Pool Weir, were ceded to the plaintiffs.

Whether what has been called in argument "the right to take the water" at that spot from the river and carry it to Stockport to be there used by the inhabitants and never returned, was also granted to them, is a disputed question under the deed. The plaintiffs affirm that it was so granted, and the defendants deny it.

It is to be taken as a fact that the defendants have polluted the stream, and although the stream had, as early as 1858, "become more foul than formerly" from causes which have nothing to do with the defendants, yet, "the foulness of the stream was sensibly increased by the refuse discharged into it from the defendants' works."

There is, therefore, no doubt that if the plaintiffs have such rights in reference to the stream as to be entitled to insist upon its purity for practical purposes, the acts of the defendants constitute a cause of action.

But the defendants contend that, whatever others may have, the plaintiffs have no such rights. And they raise a variety of very formidable objections.

In the first place, the defendants argue that, although the right to pure water is the right of a riparian proprietor, the plaintiffs are not riparian proprietors at all. Nor are the plaintiffs the assignees of a riparian proprietor.

For, first, the law knows of no such right as the subject of assignment separate from the land in respect of which it arises, and, secondly, no such assignment has in fact been made.

And the defendants say there is no authority for the proposition that these rights in respect of water, which, in *Embrey v. Owen*, 6 Exch. 353, and other modern cases, have been for the first time defined and attributed to the ownership of land by the side of a river, can be dealt with in gross and assigned in any way except in conjunction with such land.

And further, that if such rights could be the subject of transfer they have not been in fact transferred. For the deed of May, 1853, never in terms affected to pass any such right, but only the waterworks, with the use of the conduits, tunnels, &c., and a right to water power to be used for turning one or more water wheels; the water when used being returned to the river again. This turns on the construction of the deed and some general words contained in it.

The defendants also say that the rights even of a riparian proprietor himself would not extend to the *abstraction* from the stream of water for the use of a populous town situated on land in no way connected with such stream, and the conveyance of it away from the river-side to a considerable distance for that purpose without returning it into the stream.

But then the plaintiff's case, thus driven from a more exact basis, is placed upon the fact that he and those under whom he claims have done the same thing for twenty years.

To this the defendants answer that the mere doing of a particular thing for twenty years will not necessarily give a right of action against anybody who interferes with its being done as beneficially as it hitherto has been.

The plaintiffs, thus pressed, contended before us that the right they claimed of having pure water come down the stream for them to abstract and use was an "easement" acquired by more than twenty years' user, in which the Stockport Waterworks were the dominant tenement and the defendants' land the servient tenement.

Several answers were made to this. First, there was no continuing user for twenty years of a character to create an easement; for, before 1853, the user was by those who owned the land at Nab Pool Weir, and was in exercise of their ordinary riparian rights.

Secondly, the case showed that this user had within the twenty years been objected to by another riparian proprietor, and litigation had ensued which terminated in an award, so that it was not adverse and as of right against all the other riparian proprietors.

But a third and conclusive answer, as it seems to us, was given to such an easement.

The defendants' land is far higher up on the stream than the conduit or tunnel at Nab Pool Weir by which the plaintiffs abstract the water.

No amount of water abstracted by the plaintiffs or those under whom

they claim could possibly be felt by the defendants. If the water was abstracted unlawfully or in excessive quantities, or not returned into the river, the proprietors below might have cause to complain, but the defendants could not, because they could not be affected by it. They had neither the will nor the power to interfere with the plaintiffs' use nor to take legal proceedings against them.

No grant could therefore be presumed by the defendants, because no user ever existed adverse to their full enjoyment of the water. And *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 611, was cited as an express authority for this proposition.

We have thus recapitulated these arguments of the defendants because they appear to us to contain a perfect answer to the plaintiffs' claim in whatever light it can be put.

It is difficult to perceive any possible legal foundation for a right to have the river kept pure, in a person situated as this company is.

There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river the possession of which gives him his water rights, and at the same time transfer those rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant.

It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is that he can have them against the grantor, but not so as to sue other persons in his own name for an infringement of them. The case of *Hill v. Tupper*, 2 H. & C. 121, recently decided in this court, is an authority for the proposition that a person cannot create by grant new rights of property so as to give the grantee a right of suing in his own name for an interruption of the right by a third party.

The case where a riparian proprietor makes two streams instead of one and grants land on the new stream, seems to us analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights.

We think then that in this case the right claimed cannot be the subject of a grant so as to enable the plaintiffs to sue in their own name for an infringement.

Nor is the supposed easement founded on user much more defensible.

The dominant and servient tenements have no apparent connection with one another.

The abstraction of the water from the stream took place at a spot situated on other land than that now called the dominant tenement, and in no sort of way affected the enjoyment of the water at what is now called the servient tenement.

If the waterworks could be considered a dominant tenement, every house in Stockport to which the water flowed through pipes might equally be so.

And as in modern times water is often conveyed many miles under ground in pipes for the supply of large towns, the dominant and servient tenements might not only be many miles apart, but have no other connection with each other than the artificial one created by miles of pipes.

For these reasons we think that it is unnecessary more closely to investigate the effect of the deed of 1853 or to give any other reasons than those already stated, as upon the broad points of the case the defendants are in our opinion clearly entitled to judgment.

BRAMWELL, B. In this case the plaintiffs cannot rely on their mere possession of the water they take, or perhaps I ought to say on their *mere taking* of it. For whatever *Whaley v. Laing*, 3 H. & N. 675, 901, may have decided, it certainly decided this, that such possession was not enough to enable the possessor to maintain an action. For that case decides that the plaintiff had not alleged, or having alleged, had not proved, a right to the water, and so could not recover. Nor can the plaintiffs rely on the more than twenty years' user as giving them any right. They themselves have not enjoyed the water twenty years, and their enjoyment cannot be connected with the antecedent enjoyment of Messrs. Marslands. For that enjoyment was an enjoyment as riparian proprietors, which might give a right beyond the natural right against owners below whom it affected, but could not give any right against the riparian proprietors or others who were not affected by it, and could not have resisted it.

The plaintiffs, therefore, must rely on the grant from Messrs. Marsden; and upon that two questions arise. First, is a right conferred on the plaintiffs? Secondly, can they maintain an action in respect of an injury to the enjoyment under such right? On the first of these two questions there seems to me no difficulty. It is not necessary to examine the deed minutely. It is enough to say that the reservoir is granted and conveyed, and a right to have water from the river to it. If any right can be granted which will enable the grantee to maintain an action like the present, this is a sufficient grant. It is true that this is not the claim in the declaration, but that may be amended by agreement of the parties to raise the real question, and should be, if necessary. The case then is reduced to this. Can a grantee from a riparian proprietor of land, part of the former riparian estate, but separated from the stream by land of the grantor not included in the grant, with a grant from the grantor of a right to lay pipes from the stream to the granted land and take water by means of them from the stream to such

granted land, maintain an action against a person who fouls the stream? It is strange that this question should arise for the first time. There can be no doubt that the grant as between the riparian grantor and the grantee is good. And there is this to be said in favor of supporting the present claim, that we must suppose that the grantor and grantee have found the arrangement to be to their mutual advantage, that the stream can be more beneficially used this way than otherwise. Consequently that such an arrangement is for the public good. Why, then, should it not be effectual against a person, who as against the riparian proprietor is a wrongdoer? It imposes no additional burden on the riparians or others above. If they are wrongdoers by fouling now, so were they before. They could be restrained by injunction before if they can now. No doubt they might be made liable to larger damages than they would have been before, but their rights are not altered. It was said that innumerable actions might be brought if the law were as the plaintiffs contend. But there are two answers to this, one practical, viz., that they would not be brought, the other that the same might happen now if the smallest portion of the bank was granted with the right. A similar answer may be given to the supposed difficulty of the riparian proprietors above desiring to buy up rights below. The power to make such a grant then is for the benefit of the grantor, and grantee, and the public; and the only prejudice by it to the riparian or wrongdoer above is the liability to greater damages and to an action and injunction at the suit of persons additional to the riparians below. But this consideration could not preclude a covenant by the grantor that the grantee might apply in his name for an injunction or sue in his name, nor would it preclude a grant of the part of the bank where the water was taken, in which case it is clear the grantee might maintain an action or obtain an injunction. And this suggests to me the remark that what may be done indirectly may be directly. Further, it does seem strange that if a man has an estate on the bank of a stream extending a mile from it, he may build houses on the land, conduct water from the stream to them, and maintain an action and recover substantial damages for the injury to each house: that his tenants of each, if he let them, might do the same even though he demised them for 1000 years at a peppercorn rent, but that if he grants away the house in fee with the right of water, such grantee can maintain no action. What is to happen if he does so and repurchases? What would be the case if a riparian proprietor added to his estate another, to which water had been so conducted? Suppose a riparian proprietor on both sides for a great length wholly alters the course of the stream, could he not effectually complain of a fouling of the water in the new course? Suppose besides the new course he allowed the old one to continue, the stream running in both, could he not then maintain actions for the damage done to either? If he could, could not his grantee of lands on the new stream, and if such grantee could, why cannot the plaintiffs?

If the defendants' argument is well founded, it will follow that where

the owner of land on a stream has built a mill alongside the stream with a cut or lead to it, and sells the mill, but not the natural watercourse, the owner of the mill can maintain no action against a riparian owner above who abstracts the water. I cannot think this is so. Further, suppose the person fouling the water was not a riparian proprietor but a mere wrongdoer, why should not an action lie against him? I can see no reason, nor can I see that his being such proprietor makes any difference. Upon these various considerations it seems to me this action is maintainable. I think it may fairly be asked to what extent I would carry the principle upon which I decide this? My answer is, to the extent to which the analogous case extends of a grantee of a right of way. Where a grantee of a right of way could maintain an action for disturbance of his way, so do I think the grantee of a right of water might. This case of the right of way, and cases of right of common, seem to me analogous to this case and authorities for my opinion. I am of course aware of the case of *Keppell v. Bailey*, 2 Myl. & K. 516, and agree that new rights of property cannot be created, but I think that rule does not interfere with the present case. There, an owner of land was resisting a burden put on it by a former owner, and it was held that burden could not be attached to the land in the hands of the assignee. Here, no doubt, it can be, that is to say, on the lands of the riparian proprietors, the Marsdens. The question is not with them, but with one who would be a wrongdoer if he had no riparian estate or occupation, and is not the less so because he has. Nor is *Hill v. Tupper*, 2 H. & C. 121, any authority against the maintenance of this action. That case decided that in respect of what was no estate, and which gave no possession, but merely a right of action, against a covenantor, that right could not be enforced against a third party. On the other hand, *Whaley v. Laing*, 3 H. & N. 675, 901, seems a strong authority in favor of the plaintiff; for all the judges seem to have considered that had the water been taken as of right, the action would have been maintainable. I have only to add that, to my mind, this is not a question of easement or of dominant and servient tenement. The plaintiffs rely on the possession and enjoyment as of right, and charge the defendant as a wrongdoer, not the less because he is a riparian owner. I think the plaintiffs are entitled to judgment.

Judgment for the defendants.

Collier (Coxon and McIntyre with him), for the plaintiffs.

Sir Hugh Cairns (Grove, Welsby, Horatio Lloyd and Potter with him), for the defendants.¹

¹ Approved in *Ormerod v. Totmorden Mill Co.*, 11 Q. B. D. 155; but see *Nuttall v. Bracewell*, L. R. 2 Ex. 1; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *Winckell v. Clark*, 68 Mich. 64, 73; *Gillis v. Chase*, 87 N. H. 161; *Goddard*, Eas. (5th ed.) 14.

"It is contended that, as the city owns no land abutting on the river, it is not a riparian owner, and hence has no riparian rights. This is a mere question of names or definitions, which is of no legal significance whatever in the case. It is entirely immaterial whether the defendant's rights are riparian or conventional. It has rights for the disturbance of which it has a right of action. It is unimportant whether

ROBERTS v. GWYRFAI DISTRICT COUNCIL.

CHANCERY DIVISION. 1899.

[Reported [1899] 1 Ch. 583.]

THE plaintiff was the owner and occupier of an ancient water-mill, with lands belonging thereto, known as Brynygro Mill, in the parish of Llanllyfni in the county of Carnarvon, and he claimed as riparian owner and occupier of the same to be entitled to the natural flow of a stream that ran past his mill from a lake called Llyn Cwmdulyn situate at the foot of a mountain some distance above the mill, the stream being utilized for driving the mill. The plaintiff also claimed that, whenever necessary for the purposes of his mill, he was entitled, in times of drought and scarcity of water in the stream, to dam up the water of the lake as a reservoir so as to ensure a sufficient supply of water to the mill.

In May, 1893, the defendants, who had obtained a lease of the lake from the Crown and also a lease of adjoining land for the purpose of increasing the size of the lake, informed the plaintiff of their intention to take water from the lake for the purpose of supplying certain villages in their district with water, and applied to him for his written consent thereto under s. 832 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), but he refused to give such consent. Thereupon the defendants, without any further notice, laid down pipes, and under, it was said, a license granted by the Crown in 1896, constructed a dam across the end of the lake — of which the stream in question formed the natural outlet — so as to increase the water storage, a sluice being placed in the dam to regulate the outflow from the lake. The area of the lake was considerably increased by the defendants' works.

The plaintiff then, on March 30, 1898, issued the writ in this action for an injunction to restrain the defendants, their servants and agents, from taking any of the water from the lake, and from doing any act whereby the flow of water in the stream through and by the plaintiff's mill and lands would be diminished.

The defendants, as leasees and occupiers of land adjoining the lake, claimed riparian and other rights in the lake, including the right to take water therefrom for supplying their district, so far as they could do so without causing damage to other riparian owners. They denied that they had done or were intending to do anything whereby the flow of

it be held that the provision in the Farnham & Lovejoy deed in regard to the canal amounted to a division of the stream into two courses, which rendered Cutter, Secombe & Carpenter riparian owners as respects the canal, or — what seems to us more in accordance with principle and common sense — that a riparian owner may grant a part of his estate, not abutting on the stream, and, as appurtenant thereto, a right to draw water from the stream through his land. In either case the result is the same." MITCHELL, J., in *St. Anthony Falls Water-Power Co. v. City of Minneapolis*, 41 Minn. 270, 273 (1889).

water in the stream past the plaintiff's mill had been or would be diminished or so as to cause any damage to the plaintiff.

The action now came on for trial with witnesses. It was admitted at the trial that the plaintiff had not yet suffered any actual damage, and that the defendants' dam had been properly constructed for the purpose they had in view; also, that an arrangement had been made by means of the sluice for providing a regulated flow of water down the stream. This, the defendants' witnesses said, would give the plaintiff a constant supply instead of an intermittent one, which the plaintiff admitted sometimes occurred in dry seasons. The plaintiff, however, insisted that he was entitled, as of right, to the flow of water past his mill unimpeded and uncontrolled in any way by the defendants.

It was admitted by the defendants' witnesses that the supply of the district would cause the abstraction of about one-sixteenth of the water in the lake.

Warrington, Q. C., and Bryn Roberts, for the plaintiff.

Renshaw, Q. C., and A. Glen, for the defendants.

KEKEWICH, J. held that, so far as the plaintiff's claim was founded upon the ground of prescription, it failed; and that, therefore, so far as the costs had been increased by that claim the plaintiff must pay those costs, whatever might be the result of the case generally, such costs to be taxed as between solicitor and client. His Lordship then proceeded:—

With regard to the rest of the case, it raises an entirely different question. The defendants, in the exercise of what they conceive to be their duty and within their powers, utilized the waters of this lake by constructing certain works which are admitted at present to be properly constructed with a view of supplying the district with water. It is not suggested that the plaintiff will be any worse off now than he was before: probably he will be better off in the future than he has been in the past. The supply may not be the same, but it will be sufficient, and will be apparently more constant than it has been before, since the evidence shows it to have been of an intermittent character and sometimes very much less than was required for the purposes of the mill. But the plaintiff says, "I am entitled to insist upon having what I had before. It is immaterial whether the supply of water I had before is better or worse than what is now proposed to be given to me. It is for me to consider whether I shall derive any benefit from the alteration. I protest against any alteration at all." Several cases have been referred to, but I intend to refer only to one of them in which occurs a passage to which Mr. Renshaw called my attention. The law on this subject has been threshed out again and again, and I do not think any advantage would be gained by my going through the authorities. A riparian proprietor or owner is entitled to say that the water which flows by his property and which is used by him for ordinary, or it may be for extraordinary, purposes shall flow in the future as it has done in the past—*debet currere ut currere solebat*. That seems to me to be the common

law right; and unless that common law right has been affected by statute he is entitled to insist upon it. But there is one passage in Lord Cairns's speech in the House of Lords in the case of *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (L. R. 7 H. L. 697), which, Mr. Renshaw says, instead of being in the plaintiff's favor is against him. I do not so read it. What Lord Cairns says is this (L. R. 7 H. L. 705): "Therefore, my Lords, so far as regards the position of the respondents as riparian owners, it appears to me that they clearly have a right to complain of that which is done by the appellants, if what is so done by them is insisted upon as a thing which they have a right to do." That is the qualification. "I put this qualification, because, if, when the attention of the appellants had been called to what they were doing, they had not insisted upon doing it as a matter of right, I can well understand that if the Court of Chancery found . . . that no sensible damage had occurred to them, it might not have thought it necessary to interfere with them by an injunction or declaration."

What I understand Lord Cairns to mean is that, there being no sensible damage, an injunction or declaration would not have been granted unless the appellants had insisted upon what they were doing as a thing they were entitled to do as a matter of right. From which I should conclude also that, as they did insist upon it as a matter of right, whether damage was incurred or not, the respondents were entitled to an injunction or declaration. That, as I understand, is the meaning of his Lordship's observations, and what he means by the qualification, and what he deduces from it. Therefore it seems to me that, unless the defendants have some higher authority by statute (prescription being out of the question) to interfere with the flow of water, they have no right to alter the flow even although the alteration may cause no sensible damage to the plaintiff. He is entitled to have his water flowing as it did before, and so far I am entirely in his favor.

[The learned justice then held that the acts of the defendant were not justified by the Public Health Act, 1875.]

The result is that, in my opinion, the plaintiff is entitled to an injunction, and to the costs of the action as between party and party, the defendants to have their costs, as between solicitor and client, on the question of prescription. The two sets of costs will be set off one against the other. The injunction will be a perpetual injunction to restrain the defendants, their servants, agents, and workmen, from taking any water from the lake for the purpose of supplying their district with water, and from doing any other act for that purpose whereby the flow of water in the stream and through and by the plaintiff's mill and lands shall be diminished.¹

¹ Affirmed [1899] 2 Ch. 606 (C. A.). In the course of the opinion, LINDLEY, M. R., said (p. 614): "The defendants have in fact most materially altered the flow of the water to which the plaintiff is entitled. His rights are infringed by persons who admit that they have no right to do what they are doing; and under such circumstances, unless the infringers are prepared to stop what they are doing, an injunction

PITTS v. LANCASTER MILLS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1847.

[Reported 13 Met. 156.]

THIS was an action of trespass upon the case; and the declaration alleged that Samuel Carter was seised and possessed of a close, water mill, ancient dam, and the water privileges thereto appertaining, situate on the north branch of Nashua River, in Lancaster, and the right of having the whole water of said stream flow without obstruction, for the benefit of said mill, and of having the uninterrupted use and occupation of said mill and privileges; and that said Carter, being so seised and possessed, leased the said premises, for a term of years, to Hiram Pitts, who underlet the same to the plaintiffs; that the defendants, a corporation established by St. 1844, c. 20, in the months of June and July, 1845, wrongfully built and raised, above its usual height, their dam, situate across said stream, above the mill, dam and privilege occupied by the plaintiffs, and thereby hindered the water from flowing in its usual course, and thereby, for the space of two days during the said month of June, and four days during said month of July, wholly cut off the water from the plaintiffs' mill, &c.

The case was submitted to the court upon the following agreed statement of facts: "The plaintiffs are the lessees of said mill, dam and privileges, as alleged in their declaration. The defendants were the owners of a privilege on said stream, above the mill of the plaintiffs, whereon a mill had stood for some years; they erected a new mill thereon, and, for the purpose of using the whole power, raised the dam

to restrain them is almost a matter of course. That is warranted by what Lord Cairns said in the *Swindon Case*, L. R. 7 H. L. 706. I cannot appreciate the difference, for the present purpose, between claiming a right to do a thing, and saying, 'I admit I have no right to do it, but I intend to go on doing it.' If there is any difference, it is rather against the man who admits that he has no right to do a thing, but insists on doing that which he admits to be wrong."

See *Messinger's Appeal*, 109 Pa. 285.

"The question of actual specific damage by reason of the diversion, was one of pure fact, and the damages recoverable were such as already had been suffered by reason of the wrongful acts complained of. Damages necessarily resulted from the legal injury found. This necessary damage is actual as distinguished from the mere nominal damage involved in a purely technical and harmless breach of contract or in some casual and inoffensive tort; but it is nominal as distinguished from any specific damage suffered and proved. In a case like this some damage results from the mere invasion of the plaintiff's right, and its amount, not being determinable by proof, must be comparatively small and in that sense nominal; whereas specific damage results from loss by reason of the plaintiff's having been interfered with in the application of the water — to the natural flow of which he is entitled — to some beneficial use, by reason of the defendant's acts, and its existence and amount must be established by proofs." *HAMERSLEY, J.*, in *Watson v. New Milford Water Co.*, 71 Conn. 442, 450 (1899). See *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 593.

higher than it had formerly been, and kept the water back, so long as was necessary to fill their pond, and no longer. To have delayed filling said pond, until a freshet or flow of water should have raised the same, would have endangered said dam; and by keeping the water back, as aforesaid, the operations of the plaintiffs' mill were retarded or wholly suspended."

The parties agreed that if, upon the facts above stated, the action could be maintained, damages should be assessed by an auditor; otherwise, that a nonsuit should be entered.

F. H. Dewey, for the plaintiffs.

C. Allen, for the defendants.

SHAW, C. J. Every proprietor of land, through which a current of water flows, has a right to the use of it on his own land, amongst other things for mill purposes, making such reasonable use of it, and of the mill power furnished by it, as he can make consistently with a like reasonable use by other proprietors, above and below, through whose land it passes. What is a reasonable use must depend on circumstances; such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvement in manufactories and the useful arts. 8 Met. 476.

It appears by the facts stated in this case, that the defendants were proprietors of land and mills above those of the plaintiffs on the same stream; that having erected a new dam, which they had a right to do, they detained the water no longer than was necessary to raise their own head of water and fill their own pond. The court are of opinion that this was not an unreasonable use of the watercourse by the defendants, and that any loss, which the plaintiffs temporarily sustained by it, was *damnum absque injuria*.

*Plaintiffs nonsuit.*¹

¹ *Coldwell v. Sanderson*, 69 Wis. 52, 57, acc. See *Timm v. Bear*, 29 Wis. 254, 265; *Bullard v. Saratoga Mfg. Co.*, 77 N. Y. 525; *Gehlen v. Knorr*, 101 Iowa, 700.

On the rights of opposite riparian owners, see *Pratt v. Lamson*, 2 Allen, 295; *Warren v. Westbrook Mfg. Co.*, 88 Me. 58.

"The proposition of the defendant was, that he had a legal right to use a reasonable quantity of the water for the purposes of his business. The court replied that his business might reasonably require more than he could take consistently with the rights of the plaintiff. We cannot see how or on what principle the correctness of this can be impugned. The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both. The true rule was given to the jury. The defendant had a right to such use as he could make of the water without materially diminishing it in quantity or corrupting it in quality. If he needed more, he was bound to buy it. However laudable his enterprise may be, he cannot carry it on at the expense of his neighbor. One who desires to work a lead-mine may require land and money as well as water; but he cannot have either unless he first makes it his own." *Wheatley v. Chrisman*, 24 Pa. 298, 302 (1855).

"As between two proprietors, neither of whom has acquired superior rights to the other, it cannot be said that one 'has no right to use the water to the prejudice of the proprietor below him,' or that he cannot lawfully 'diminish the quantity which would descend to the proprietor below,' or that 'he must so use the water as not materially to diminish its quantity.' Such a rule would be in effect this: that the lower proprietor must be allowed the enjoyment of his full common-law rights as such, not

ELLIOT v. FITCHBURG RAILROAD COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1852.

[Reported 10 Cush. 191.]

THIS action was tried in this court, at the October Term, 1849, before *Metcalf, J.*, under whose rulings a verdict was found for the defendants. The plaintiff excepted to the rulings and instructions, which, with the facts of the case, sufficiently appear in the opinion.

D. S. and W. A. Richardson, for the plaintiff.

G. F. Farley, for the defendants.

SHAW, C. J. This is an action of the case against the defendants, for diverting the water of a small brook, passing through land of the plaintiff in Shirley. The facts are briefly these: The plaintiff is the owner of certain land, and for more than sixty years a small brook, having its sources in several ponds, has, in its natural course, flowed through lands of various persons, viz.: of one Clark, of one Furnin, and then through the plaintiff's land, which is about half a mile below said Clark's, and from the plaintiff's land, through various other lands to Nashua River. Said brook was in part supplied by a never-failing spring, on said Clark's land, near said brook, and having its outlet into it. The defendants, pursuant to a warranty deed from said Clark, of a perpetual right and privilege to make and maintain a dam and reservoir, and draw and use the water therefrom, erected such dam across said stream, below said spring, and made said reservoir upon and about the same, and inserted a lead pipe therein, by means of which they have used and constantly taken water, from said reservoir, to their depot in Shirley, and used the same for furnishing their locomotive steam-engines with water, and for other similar purposes. The defendants offered evidence tending to prove that said Clark, where said brook runs through his meadow, which is wet and springy, had cut ditches across the meadow to the brook, thereby increasing the flow of

diminished, restrained, or in any manner limited or qualified by the rights of the upper proprietor, and must receive the water in its natural state as if no proprietorship above him existed. Such a rule could not be law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream. . . . But as between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether under all the circumstances of the case the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other." *COOLY, J.*, in *Damont v. Kellogg*, 29 Mich. 420, 428 (1874).

"Such damages as are incident to, and necessarily result from, a proper use of the water must be borne; but the manufacturer has no right to do any act that in its consequences is injurious to others because it is a matter of convenience or economy for him to do it." *Canfield v. Andrew*, 54 Vt. 1, 16 (1882).

water to the brook; and it was further proved that there is no outlet for the water of said meadow, except into this brook. The meadow is situate below the dam.

The plaintiff contended that if the jury were satisfied of the existence of the brook as alleged, and the diversion of the water therefrom by the defendants, he was entitled to a verdict for nominal damage, without proof of actual damage. But the presiding judge instructed the jury that unless the plaintiff suffered actual perceptible damage in consequence of the diversion, the defendants were not liable in this action. In connection with this instruction, the judge further instructed the jury that if they believed that the defendants, by excavating said reservoir and spring above the dam, or that said Clark, by digging said ditches, had increased the flow of water in said brook, equal to the quantity of water the defendants had diverted therefrom, then the defendants were not liable in this action.

The whole court are of opinion that this direction was right, in both particulars.

This appears to have been a small stream of water, but it must, we think, be considered that the same rules of law apply to it, and regulate the rights of riparian proprietors, through and along whose lands it passes, as are held to apply to other watercourses, subject to this consideration, that what would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream, just sufficient to furnish water for domestic uses, for farm-yards, and watering-places for cattle.

The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in watercourses passing through or by their lands. It presupposes that the diversion of any portion of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below, on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right.

The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character, that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use, may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agricultural or manufacturing purposes, would cause no sensible or practicable diminution of the benefit, to the prejudice of a

lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms, would be of great and manifest injury to those below, who need it for domestic supply, or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is therefore, to a considerable extent, a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes.

It has sometimes been made a question whether a riparian proprietor can divert water from a running stream, for purposes of irrigation. But this, we think, is an abstract question which cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump, — for the mode is not material, — to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which in its ordinary operation will nearly or quite absorb the whole volume of the stream, although the relative position of the land and stream are such that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, whilst the other would nearly deprive him of the whole beneficial use, and yet, in both, the water would be used for irrigation. We cite a few of the leading cases in Massachusetts on this subject. *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Mass. 420; *Cook v. Hull*, 3 Pick. 269; *Anthony v. Lapham*, 5 Pick. 175.

This rule, that no riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law, incidental and beneficial, necessarily flows from the principle, that the right to the reasonable and beneficial use of a running stream, is common to all the riparian proprietors, and so, each is bound so to use his common right, as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right, by all the proprietors. Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration or retardation of the natural current, it would follow, that each

lower proprietor would have a right of action against any upper proprietor, for taking any portion of the water of the stream for any purpose; such a taking would be a disturbance of his right; and if taken by means of a pump, a pipe, a drain, or otherwise, though causing no substantial damage, it would be a nuisance, and warrant the lower proprietor, in entering the close of the upper, to abate it. *Colburn v. Richards*, 13 Mass. 420.

It would also follow, as the legal and practical result, that no proprietor could have any beneficial use of the stream, without an encroachment on another's right, subjecting him to actions *toties quoties*, as well as to a forcible abatement of the nuisance. If the plaintiff could, in a case like the present, have such an action, then every proprietor on the brook, to its outlet in Nashua River, would have the same; and because the quantity of diminution is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimack River to the ocean. This is a sort of *reductio ad absurdum*, which shows that such cannot be the rule, as was claimed by the plaintiff.

Without intending at present to state the authorities fully, we refer to the following English cases, as tending to illustrate and fix the rule as stated. *Bealey v. Shaw*, 6 East, 208; *Duncombe v. Randall*, Hurlst. & Gord. 748; *Williams v. Morland*, 2 B. & C. 910; 4 Dow. & Ry. 583; *Wright v. Howard*, 1 Sim. & Stu. 190.

If the use which one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below, by diminishing the value of his land, though at the time he has no mill or other work to sustain present damage, still, if the party thus using it, has not acquired a right by grant, or by actual appropriation and enjoyment twenty years, it is an encroachment on the right of the lower proprietor, for which an action will lie. *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; *Wood v. Waud*, 3 Welsby, Hurlst. & Gord. 748. But the doctrine is much discussed and settled on deliberation, in a recent case decided in the Court of Exchequer. *Embrey v. Owen*, 6 Welsby, Hurlst. & Gord. 353. -

The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is therefore only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie; but for such deprivation or unwarrantable use, an action will lie, though there be no actual present damage. So it is subsequently stated in the close of the case last cited: "So long as this reasonable use by one man of this common property does no actual and perceptible damage to the right of another to the similar use of it, no action will lie."

We think the most reliable American authorities are to the same effect. 3 Kent, Com. (6th ed.) 439; Angell on Watercourses, ch. iv.; *Blanchard v. Baker*, 8 Greenl. 253; *Tyler v. Wilkinson*, 4 Mason, 397; *Webb v. Portland Manufacturing Co.*, 3 Sumner, 189; *Anthony v. Lapham*, 5 Pick. 175.

The same doctrine has been held in a recent case in New York. *Van Hoesen v. Coventry*, 10 Barb. 518.

In applying these rules to the present case, we are to consider that Clark, who owned the land on which the dam was built, and the defendants to whom he conveyed all his right to the use of the water, as holding together the whole right, and it is to be considered in the same manner as if the defendants owned the land. We think it was properly left to the jury to find, whether the defendants, claiming in the right of Clark, had by their diversion of the water for a valuable and highly beneficial use, caused any actual or perceptible damage, and if not, to find for the defendants. It is very clear, that here is no complaint of the total diversion of the stream from the plaintiff's land; no such ground of complaint is set forth, or relied on. The bed of the stream and the stream itself, remains and passes through the plaintiff's land as it did before. The gravamen of the complaint is, not for diverting the stream itself, but for abstracting a part of the water of the stream. This is a right which each proprietor has, if exercised within a reasonable limit. The proper question therefore was, whether in the mode of taking, in the quantity taken, and the purpose for which it was taken, there was a reasonable and justifiable use of the water by Clark. The use being lawful and beneficial, it must be deemed reasonable, and not an infringement of the right of the plaintiff, if it did no actual and perceptible damage to the plaintiff; and therefore we think that question of fact was rightly left to the jury, who must have found that it did him no such damage.

We consider the other direction correct also, as we understand it. The question was not, if the defendants had caused a damage to the plaintiff, amounting in law to a disturbance of his right, for which an action would lie, whether it would be barred by an advantage of equal value, conferred in nature of a set-off; but whether the improvements of Clark upon his meadow, taken together as a whole, including the dam and ditches as parts of one and the same improvement, any damage was done to the plaintiff; and this we think was correctly so left.

It may perhaps be proper to guard against misconstruction, in considering what are the general rights and duties of persons owning lands, bounding on running streams, by the general rules of law and for general purposes, that some alterations of these rules, may be effected in Massachusetts, by the Acts of legislation on that subject, in respect to mills, and the construction which has been judicially put upon such legislative Acts. This system originated with the Provincial Act, 13 Anne, passed in 1714, Ancient Laws and Charters, 404. This Act by its operation necessarily secures, to some extent, advantages to the prior occupant

of a stream, by a dam erected to work a mill. *Bigelow v. Newell*, 10 Pick. 848; *Bemis v. Upham*, 13 Pick. 167; *Baird v. Wells*, 22 Pick. 312.

It is not necessary, however, now to go into this subject, but merely to say that the rights to streams of running water, upon which the present question turns, are not dependent upon, or affected by, the Mill Acts.
*Exceptions overruled.*¹

SNOW v. PARSONS.

SUPREME COURT OF VERMONT. 1856.

[Reported 28 Vt. 459.]

ACTION on the case for the obstruction of the plaintiff's water-wheel by the tan-bark discharged at the defendants' tannery on the stream above, and suffered to float down to the plaintiff's mill. The action was referred, and the referee reported the following facts.

The plaintiff was the owner of a saw-mill in West Dover, upon a branch of Deerfield River, together with a privilege of water to operate the same from 1842 to 1845, when he sold them, and from 1849, when he re-purchased, until the commencement of this suit.

In 1844 a tannery was erected upon the same stream, about a mile and three-fourths above the plaintiff's saw-mill, and was so situated that the tan vats were directly over the stream, and the spent tan was discharged into the stream, and carried by the water down to and by the plaintiff's saw-mill. On the 4th of October, 1849, the defendants purchased the said tannery, and have ever since continued to own and occupy it, using yearly a large amount of tan-bark, which, after being used, was discharged into the stream and suffered to float down the same. A portion of this tan-bark floated down and lodged in the plaintiff's pond, where it accumulated to considerable extent, and some floated into the flume to the plaintiff's mill, which somewhat incommoded him. Sometimes the tan-bark would accumulate so as to somewhat impede the flow of the water into the flume, but it did not appear that the plaintiff had sustained much inconvenience from that cause, as

¹ See *McCartney v. Londonderry, &c. R. R. Co.*, [1904] A. C. 301; *Garwood v. N. Y. C. R. R. Co.*, 83 N. Y. 400; *Clark v. Pa. R. R. Co.*, 145 Pa. 488; *Louisville & N. R. R. Co. v. Beauchamp*, 40 S. W. Rep. 679 (Ky., 1897).

"The railroad company may use this water by virtue of its right as riparian owner; but such use must be such as not to sensibly diminish the stream to the riparian owner below. The water belongs to both, and if the former wants more than its share it must take it under its right of eminent domain and pay for it." *Paxson, J.*, in *Pa. R. R. Co. v. Miller*, 112 Pa. 34, 42 (1886).

On the duty of the dominant owner to the servient owner in the construction and care of a ditch, see *Bell v. Twentymen*, 1 Q. B. 766; *Big Goose Ditch Co. v. Morrow*, 8 Wyo. 537. Cf. *Buckley v. Buckley*, [1898] 2 Q. B. 608.

it was easily removed, and the obstruction did not often occur. The tan-bark accumulated in the plaintiff's pond much more rapidly after the defendants commenced operating the tan-works in 1849, and was doubtless owing to the increased quantity of bark used at the tannery; and after October, 1849, portions of it lodged in and upon the plaintiff's saw-mill wheel, whereby the same was impeded and repeatedly stopped, and the plaintiff was thereby subjected to some little delay in operating the mill, and labor in removing the obstruction and getting the wheel in motion. The wheel was of cast iron, and known as the Ferguson reaction-wheel, and was so constructed that when tan-bark lodged in it, it was somewhat difficult to remove it, but it might have been altered without impairing its usefulness, and at a small expense, so that the tan-bark would not impede or affect its operations; and prior to 1846 the wheel used was of a different construction, and was not, and would not be obstructed or injuriously affected in any way, by the floating down of the tan-bark.

Upon the hearing before the referee the defendants offered to prove that it had been the universal and uniform custom and practice in all the counties of this State to discharge the spent bark of tanneries into the streams on which they were situated, ever since the country was first settled, and that dam-owners situated below on the streams had never, so far as the witnesses knew, disputed the right to do so until now; and that tanneries could not be conducted at any profit without that means of disposing of their spent tan-bark, and that the withholding such use of the streams from tanners, would, in the belief of the witnesses, have excluded that branch of industry from this State; and that the same custom and the same practice had uniformly prevailed in all the States and counties of New England, so far as the witnesses had had opportunity of knowing.

To this testimony the plaintiff objected. The defendants admitted that prior to 1844, there was no tannery on this stream. The referee, intending to decide according to law, excluded the testimony offered; and the right of the plaintiff to recover upon the foregoing facts was submitted by the referee to the court; the damages being assessed at forty dollars, if the plaintiff was entitled to recover.

The County Court, September Term, 1854, — *Underwood, J.*, presiding, — rendered judgment, upon the report, for the plaintiff. Exceptions by the defendants.

J. D. Bradley and *Butler & Knowlton* for the defendants.

Shafter & Davenport for the plaintiff.

The opinion of the court was delivered, at the circuit session in October, by

REDFIELD, CH. J. The important and, as I think, the only question in this case, is whether it is proper for extensive tanneries, upon moderate sized streams, to expend their refuse, or spent bark, into the stream. In regard to many uses of the water in streams, it has been so long settled by common consent, or is so obvious in itself, that it is

determinable, as matter of law. Such are the uses for irrigation, for propelling machinery, and for watering cattle, and some others. And in regard to some *débris* or waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and in some instances the indispensable necessity, would seem sufficiently to decide such cases. Among these may be named the infusion of soap dyes, and other materials used in manufacturing, into the streams by which the machinery is propelled. The deposit of saw-dust, to some extent, is nearly indispensable in the running of saw-mills, and most other machinery used in the manufacture of wood, and propelled by water power.

The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit, which might be of no account in some streams, might seriously affect the usefulness of others. So, too, a kind of deposit, which would affect one stream seriously, would be of little importance in another. There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below. This is true of everything which we use in common with others. The air is somewhat corrupted by the most ordinary use; large manufacturing establishments affect it still more seriously; and some, by reason of their vicinity to a numerous population, become so offensive and destructive of comfort, and health even, as to be regarded as common nuisances. Within reasonable limits, those who have a common interest in the use of air and running water, must submit to small inconveniences to afford a disproportionate advantage to others.

It seems to us that this question of the reasonableness of the use of a stream, when it is not settled by custom, and is in its nature doubtful, should always be regarded as one of fact, to be determined by the tribunal trying the facts. In the present case it does not seem to have been treated in that light, unless we regard the judgment of the county court in favor of the plaintiff, as determining it. And, as much of the testimony rejected might have had an important bearing upon this question, and no notice is taken of this point either in the report or the judgment, we must suppose it was not the purpose of the County Court to decide the case upon that ground. Indeed, the report furnished no adequate materials for such a determination. That portion of the defendants' offer which tended to show that tanneries could not be operated to any useful purpose, without thus disposing of their waste bark, was almost a cardinal point, in determining the main question, and, if shown to the extent offered, might justify the court in finally requiring the proprietors below to submit to *some* inconvenience that those above might not be deprived of all benefit of the stream for this

kind of manufacture. And the reasonableness of plaintiff's submitting to this inconvenience must depend upon its extent, and the comparative benefit to the defendants, to be judged of by the triers of the facts.

This must be determined upon general principles applicable to the entire business of tanning, and the importance of discharging its waste materials in this mode, and the probable inconvenience of those below. And if, in this view, they regard the use as an unlawful one, then surely the defendants are liable to all damage sustained by the plaintiff, whether he might have used a wheel less liable to such injury, or not.

But if the use is fairly to be regarded as a lawful one, then, probably, the plaintiff should have conformed his machinery to the altered circumstances of the stream. And if the defendants' use of the stream is a lawful and allowable one, it will make no difference that the plaintiff's mill was first erected, if it had not been in operation a sufficient length of time to acquire any prescriptive right to use the water in an extraordinary manner. And as the plaintiff's present wheel was put into his mill after the defendants' tannery was in operation, and his other wheel would not have been unfavorably affected by bark, nothing, by way of prescription, or license, or prior occupancy, can probably be claimed.

And upon the question of the reasonableness of the defendants' use of the stream, it seems to me the uniform custom of the country for generations, would be of some significance in determining its reasonableness. A uniform general custom upon this subject, ought, upon general principles, to have a controlling force. We think, therefore, the case should go back to be determined, upon the question of fact, of the reasonableness of the use by the defendants: 1st, upon general grounds; 2d, the peculiar facts, if any, affecting the reasonableness of the use in this particular case.

In regard to the usage in the country as to tanneries, for generations, without controversy, if shown as offered to be, and if it is all one way, it would have almost the force of law. For all the cases which we have, where reasonable care and diligence can be determined as questions of law, without going to the jury, have grown up out of the practice of particular classes of persons, which, becoming settled and uniform, and known to all, is declared by the court as a rule of law; which, while it was uncertain, was matter of fact to be determined by the jury. A familiar instance of this is the demanding payment, and giving notice of dishonor of bills and notes, which is now fixed to the day the note or bill becomes due, and giving notice by the mail of the next day. Formerly this was submitted to a jury of merchants, who determined the reasonableness of demand and notice upon the particular facts in the case, with reference to the more common usage of merchants.

So, too, in this particular business, if the court were tanners, we might be able to say that bark must, of necessity, be spent in the

stream in order to carry on the work at all, or that, in fact, the bark did not essentially injure the proprietors below, or we might know the contrary of both propositions. But not being such, it seems to us as much matter of fact as any other question of reasonable care and diligence.

It is settled law, that every riparian proprietor may use the water for purposes of manufacture, but so use it as not unnecessarily to abridge the use to others; i. e., every such proprietor may use it with care and prudence. What care and prudence is, in such case, must depend upon the facts of each case, the conclusion to be drawn by the triers of the fact. And to assist them in making this conclusion, if they are not themselves experts in the business, they are entitled to have the experience and wisdom of such as are experts, to enable them to judge of the reasonableness of the particular use.

The measure of reasonable care and prudence in such cases, is that which prudent and careful men exercise in the management of their own business. And how are we to know this without proof, in those departments of business with which we are not familiar? Proof that all prudent and careful men, in the management of this business, pursued a given course, and that others acquiesced in that course, without objection, would seem to be of the very essence of the inquiry before the jury, in such cases.

*Judgment reversed, and case remanded.*¹

¹ Evidence of custom was admitted in *Dumont v. Kellogg*, 29 Mich. 420; and was not admitted in *Hayes v. Waldron*, 44 N. H. 580, and *Timm v. Bear*, 29 Wis. 254, 269.

As to the right to discharge sawdust, see *Prentice v. Geiger*, 74 N. Y. 841; *Green v. Gilbert*, 60 N. H. 144; *Canfield v. Andrew*, 54 Vt. 1.

POLLUTION OF STREAMS. "It may be conceived, that if a field be covered with houses, the ordinary use by the inhabitants might sensibly diminish the stream; yet no action would, we apprehend, lie, any more than if the air was rendered less pure and healthy by the increase of inhabitants in the neighborhood, and by the smoke issuing from the chimneys of an increased number of houses." *Per* POLLOCK, C. B., in *Wood v. Waud*, 8 Ex. 748, 781 (1849). And see *Merrifield v. Worcester*, 110 Mass. 216.

By agricultural uses, see *Helfrich v. Catonsville Water Co.*, 74 Md. 269; *People v. Elk River Mill Co.*, 107 Cal. 214.

"The case of a stream affords a very clear illustration of the difference between injury and damage; for the pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions." *Per* FRY, J., in *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769, 772. See also *Crossley v. Lightowler*, L. R. 2 Ch. 478.

"Equally untenable is another position advanced by the defendant, viz., that the river was always more or less polluted by contributions from other mines and from the washing of plowed fields, public roads and railroad embankments. Such insistments have been frequently made and always overruled. The question in such cases seems to be whether the stream has already become so far polluted by contributors who have acquired a right so to do by adverse user or otherwise, as that the pollution presently opposed will not sensibly alter its condition. And even in such a case the courts have held that the party has the right to deal with each contributor in detail, and to buy off such contributors as have acquired a right, and is not obliged

BLODGETT v. STONE.,

SUPREME COURT OF NEW HAMPSHIRE. 1880.

[Reported 60 N. H. 167.]

CASE, for diverting the water of a natural stream from the plaintiff's aqueduct. The defendant offered a brief statement alleging that the plaintiff had previously filed a bill in equity for an injunction against the defendant, based substantially on the facts now stated in his declaration, upon which an application for a temporary injunction had been denied after a full hearing of the facts before one of the justices of the court, and the equity suit had been entered "neither party," after the defendant had filed an answer denying the equity of the bill. No replication was filed, and no decree was ever entered up. The brief statement was rejected, and the defendant excepted. The defendant requested the following instructions to the jury, which the court declined to give, and the defendant excepted: "If the jury find that what Stone did was done from malice, still he is not liable unless his act caused actual damage to the plaintiff, and then only for the actual damages caused to the plaintiff; and the verdict in that case would settle nothing as to the legal rights of the parties." Verdict for the plaintiff.

Ladd and Fletcher, for the defendant.

Ray, Drew, and Heywood, for the plaintiff.

CLARK, J. The facts stated in the brief statement constituted no defence, and it was properly rejected. The proceedings in the bill in equity were immaterial. No decree was entered up. If the judge who heard the application for a temporary injunction denied it on the merits, it would not be a bar to a subsequent hearing on the bill, and it is no bar to this suit. The request for instructions, that the defendant was not liable unless his act caused actual damage to the plaintiff, was

to submit to fresh contributors." PITNEY, V. C., in *Beach v. Sterling Iron Co.*, 54 N. J. Eq. 66, 76.

As to a change in the manner of pollution, where a prescriptive right to foul the water has been acquired, see *Clarke v. Somersetshire Drainage Commrs.*, 60 L. T. R. 670.

In *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126 (1886), after four writs of error, it was held (overruling a former decision in the same case), that one who operates a coal mine in the ordinary manner, may on his own land drain the water which percolates into the mine, into a stream which forms the natural drainage of the land where the mine is situated, though as a result the water becomes so polluted as to be unfit for the domestic purposes of lower riparian proprietors. *Pa. Coal Co. v. Sanderson* was approved in *Barnard v. Sherley*, 135 Ind. 547. *Contra*, however, are *Young v. Bankier Distillery Co.*, [1898] A. C. 691 (Sc.); (and see *Pennington v. Brinsop Coal Co.*, *supra*); *Drake v. Lady Ensley Coal Co.*, 102 Ala. 501; *Beach v. Sterling Iron Co.*, *supra*; *Columbus Coal Co. v. Tucker*, 48 Ohio St. 41; see also 83 Am. L. Reg. (N. S.) 1. *Pa. Coal Co. v. Sanderson* has been closely limited in its own jurisdiction; see *Robb v. Carnegie*, 145 Pa. 324, 338; *Pfeiffer v. Brown*, 165 Pa. 267; *Hindson v. Markle*, 171 Pa. 138.

rightly refused. The plaintiff was entitled to a verdict for nominal damages upon proof of the infringement of his right, although no actual injury was shown. *Tillotson v. Smith*, 32 N. H. 90; *Bassett v. Company*, 28 N. H. 438; *Woodman v. Tufts*, 9 N. H. 88; *Munroe v. Stickney*, 48 Me. 462; *Chaffee v. Pease*, 10 Allen, 537; *Stowell v. Lincoln*, 11 Gray, 434.

Judgment on the verdict.

SMITH, J., did not sit; the others concurred.

NOTE.—APPROPRIATION IN ARID REGIONS. "When it is said that such use must be made of the water as not to affect the material rights of other proprietors, it is not meant that there cannot be any diminution or decrease of the flow of water; for, if this should be the rule, then no one could have any valuable use of the water for irrigation, which must necessarily, in order to be beneficial, be so used as to absorb more or less of the water diverted for this purpose. The truth is that under the principles of the common law in relation to riparian rights, if applicable to our circumstances and conditions, there must be allowed to all, of that which is common, a reasonable use. But, if prior appropriation is to prevail, then different rules must be applied. Under the principles of prior appropriation, the law is well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for a beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land, by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that, if the capacity of the flume, ditch, canal, or other aqueduct, by means of which the water is conducted, is of greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled, not only to his needs and necessities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability, and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purposes to which

B. *Diffused Waters.*

I. PERCOLATING WATERS.

ACTON v. BLUNDELL.

EXCHEQUER CHAMBER. 1843.

[Reported 12 M. & W. 324.]

TINDAL, C. J.¹ The question raised before us on this bill of exceptions is one of equal novelty and importance. The plaintiff below, who is also the plaintiff in error, in his action on the case, declared in the first count for the disturbance of his right to the water of certain *under-ground springs, streams, and watercourses*, which, as he alleged, ought of right to run, flow, and percolate into the closes of the plaintiff, for supplying certain mills with water; and in the second count for the draining off the water of a certain *spring, or well of water* in a certain close of the plaintiff, by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit, and enjoyment of the water of the said spring or well for the convenient use of his close. The defendants by their pleas traversed the rights in the manner alleged in those counts respectively. At the trial the plaintiff proved, that, within twenty years before the commencement of the suit, viz. in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinkings was, that, by the first, the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The learned judge before whom the cause was tried directed the jury, that, if the defendants had proceeded and acted in the usual and proper manner on the land, for the purpose of working and winning a coal-mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration as the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator.

"These general principles are of universal application throughout the states and territories of the Pacific coast. They have, in one form or another, been declared, upheld, and maintained by a uniform current of decisions in this state. The same rule prevails in California, Colorado, Oregon, Utah, Montana, and Idaho (citing authorities)." HAWLEY, J., in *Union Mill & Mining Co. v. Dangberg*, 81 Fed. Rep. 73, 94 (Cir. Ct., Nevada, 1897). See *Drake v. Earhart*, 2 Idaho, 760; *Benton v. Johncox*, 17 Wash. 277.

¹ The case is sufficiently stated in the opinion.

traversed by the second and third pleas. Against this direction of the judge the counsel for the plaintiff tendered the bill of exceptions which has been argued before us. And after hearing such argument, and consideration of the case, we are of opinion that the direction of the learned judge was correct in point of law.

The question argued before us has been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface.

The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established; each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King's Bench in the case of *Mason v. Hill*, 5 B. & Ad. 1; 2 Nev. & M. 747, and substantially is declared by the Vice-Chancellor in the case of *Wright v. Howard*, 1 S. & S. 190, and such we consider a correct exposition of the law. And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong.

But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law (which would seem to be the opinion of Fleta and of Blackstone), the origin of which is lost by the

progress of time; or it may not be unfitly treated, as laid down by Mr. Justice Story, in his judgment in the case of *Tyler v. Wilkinson*, 4 Mason's (American) Reports, 401, in the courts of the United States, as "an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law." But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface: no man can tell what changes these underground sources have undergone in the progress of time: it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well: again, no proprietor knows what portion of water is taken from beneath his own soil: how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface: he receives as much from his higher neighbor as he sends down to his neighbor below: he is neither better nor worse: the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil: and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor, he may impose on such neighbor the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space

within which the claim of right to an underground spring can be confined: in the present case, the nearest coal-pit is at the distance of half a mile from the well: it is obvious the law must equally apply if there is an interval of many miles.

Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

No case has been cited on either side bearing directly on the subject in dispute. The case of *Cooper v. Barber*, 3 Taunt. 99, which approaches the nearest to it, seems to make against the proposition contended for by the plaintiff. In that case the defendant had for many years penned back a stream for the purpose of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land: but as this percolation had been insensible, and unknown by the plaintiff until the land was applied for building purposes, the court held, that the defendant had gained no right thereby, so as to justify its continuance. The case of *Partridge v. Scott*, 3 M. & W. 280, is an authority to show, that a man, by building a house on the extremity of his own land, does not thereby acquire any right of easement, for support or otherwise, over the adjoining land of his neighbor. It is said in that case, "he has no right to load his own soil, so as to make it require the support of that of his neighbor, unless he has some grant to that effect." It must follow, by parity of reason, that, if he digs a well in his own land so close to the soil of his neighbor, as to require the support of a rib of clay or of stone in his neighbor's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties, if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary; which is, in substance, the very case before us.

The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe.

The authority of one at least of the learned Roman lawyers appears decisive upon the point in favor of the defendants; of some others the opinion is expressed with more obscurity. In the Digest, lib. 39, tit. 3,

De aqua et aquæ pluviz arcendæ, s. 12, "Denique Marcellus scribit, Cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem; et sane non debet habere, si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit."

It is scarcely necessary to say, that we intimate no opinion whatever as to what might be the rule of law, if there had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

We think, therefore, the direction given by the learned judge at the trial was correct, and that the judgment already given for the defendants in the court below must be affirmed. *Judgment affirmed.*¹

Counseling, for the plaintiff.

Addison, for the defendant.



CHASEMORE v. RICHARDS.

HOUSE OF LORDS. 1859.

[Reported 7 H. L. C. 349.]

THIS was a proceeding in error on a judgment in the Court of Exchequer Chamber. The plaintiff was a millowner near Croydon; the defendant, the clerk of the Local Board of Health of that town, in which character he was sued.

The declaration stated that the plaintiff was possessed of an ancient mill, with the appurtenances, and was entitled to the flow of a certain stream, called the Wandle, for the purpose of working, using, and more conveniently enjoying the said mill, and that the said board wrongfully abstracted and prevented the flow of and diverted the water of the said stream away from the said mill, and wrongfully abstracted and prevented and intercepted the flow of and diverted water which

¹ The principle of *Acton v. Blundell* applies to draining off by percolation water already collected in a well. *New River Co. v. Johnson*, 2 E. & E. 435.

ought to have flowed into the said stream and mill, and continued to abstract, prevent, divert, and intercept the same respectively, by digging and sinking a well near to the said stream, and taking the water of such well.

The defendant pleaded, Not guilty, by Statute. The Statute stated in the margin was 11 & 12 Vict. c. 63, § 139, a public Act. Upon this plea issue was joined.

The cause came on for trial at the Kingston Assizes in March, 1854, before Mr. Baron *Alderson*, when a verdict was entered for the plaintiff, subject to the award of Mr. Creasy, with power to him to state a special case for the opinion of the court. A case was stated, and the following are the material facts set forth in it:—

“The plaintiff is, and at the time of the acts complained of was, possessed of and was the occupier of an ancient mill on the River Wandle, in the county of Surrey, called Waddon Mill, situate about one mile from the town of Croydon in the said county.

“The plaintiff, and the preceding possessors and occupiers of the said mill, had, for upwards of sixty years next before the acts of the local board hereinafter mentioned, and for upwards of sixty years next before the bringing of the action, used and enjoyed as of right, and been entitled to use and enjoy the flow of the said river for the purpose of working and using the said mill.

“The River Wandle commences, and always has commenced, its course near the part of the town of Croydon which is nearest to the said mill, and the said river flows and always has flowed thence to and by the plaintiff’s mill.

“The River Wandle is, and always has been, fed and supplied above the plaintiff’s mill by (among other sources of supply) the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of Croydon and its vicinity.

“Large quantities of this water sink into the upper ground to various depths, and then flow and percolate through the strata towards and to the River Wandle (if not interfered with), in some instances rising to the surface as springs, and then flowing as little surface streams into the river; in other instances finding their whole way underground into the river. The precise lines and courses in which the underground runlets and particles of water so find their way underground towards and to the river vary continually and infinitely with the shiftings and variations in the soil which occur from natural causes, but the general flow of large quantities of water to the River Wandle is as above described; and if they are not interfered with or intercepted, they form considerable sources of supply to the river, as well above as below the plaintiff’s mill.

“It is impossible to know beforehand the precise or complete effect which the sinking a new well, and pumping from it in any part of the district above described, may have upon springs or streams in the vicinity; the effect may be instantly sensible and considerable, or for a

long time no sensible effect may appear; but the natural effect of abstracting a large quantity of water at any spot of the district above described is to diminish the quantity at every other spot throughout the district, though the amount of diminution at particular spots may be infinitesimally small; and the natural effect to be reasonably expected from sinking a new well in such a district, and from continually or almost continually pumping thence large quantities of water for a long time, must be the sensible diminution of the water supply of springs and streams in the vicinity.

“The above description is to be taken to apply to the district in question, not merely at the present time, but for sixty years and upwards next before the works and acts of the Local Board of Health hereinafter mentioned, and for sixty years and upwards before the bringing of the action.

“The Local Board of Health for the town of Croydon was duly constituted under the ‘Public Health Act,’ and under the ‘Public Health Supplemental Act, 1849.’

“In the year of our Lord 1851, the said local board, for the purpose of supplying the town of Croydon with water, and for other sanitary purposes under the said Statutes, made and sank a large well to the depth of seventy-four feet in their own ground, in a piece of land of and belonging to them in the town of Croydon, and within the district which has been above described. The distance of the said well from the commencement of the River Wandle is about a quarter of a mile. They also erected pumps and steam-engines on their said ground, and began to pump water from the well into a reservoir and pipes, for the supply of the town at the end of the said year, and, with slight periods of intermission, have continued to do so to the present time.

“The amount of water so pumped and taken by them through and from the said well during the period of six calendar months from the 16th of August, in the year of our Lord 1853, to the 16th day of February in the year of our Lord 1854, was between 500,000 and 600,000 gallons daily. Part of the said quantity of water so then pumped and taken by them through and from the said well, was water then flowing and finding its way underground through the strata in the manner above described, towards the River Wandle, and which, if not intercepted by the operation of the said well and pumping, would have flowed and found its way into the River Wandle above the plaintiff’s mill; but which by the operation of the said well and pumping, was drawn away into the said well, and thence pumped up and taken by the said local board: and I find, as a fact, that the said local board did during the six months aforesaid, by means of the said well and pumping, abstract, divert, and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the River Wandle, and would then and there, as part of the water and stream of the said river, have flowed and found its way to the said mill of the plaintiff, and have been applicable and serviceable to and for the

working thereof, and that the same was sufficient in quantity to have been of sensible value in and towards the working of the said mill.

"And I find that the said local board did not, during any part of the time in question, intercept, divert, or abstract, or draw into their well, any water which had already joined the said River Wandle and become integral part of the same, or which had already joined and become integral part of any surface stream running into the said river.

"I further find that the said local board, throughout all their acts and works hereinbefore described, were actuated by no malice against the plaintiff or any one else, and that they did not intend in any way to diminish the quantity of water in the River Wandle, or to injure any person interested in the use of the said river; but the said board at the time of their said acts and works, and throughout the said period of six months particularly in question in this cause, had reasonable means of knowing the probable and natural effects of their said acts and works.

"In considering this case, the court is to have power to draw all inferences of fact which a jury might draw.

"The question for the opinion and judgment of the court is whether, under these circumstances, the said Local Board of Health is legally liable in this action to the plaintiff for the abstraction of water as above described."

On the 14th May, 1856, the Court of Exchequer, acting upon the authority of *Broadbent v. Ramsbotham*, 11 Exch. 602, and without hearing any argument, gave judgment for the defendant.

On the 12th May, 1857, the Court of Exchequer Chamber affirmed that judgment, Mr. Justice Coleridge differing from the other judges. 2 H. & N. 168. On this judgment error was suggested.

The judges were summoned, and Mr. Justice Wightman, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Baron Bramwell, and Mr. Baron Watson, attended.

Mr. Bovill and *Mr. Needham* (*Mr. Raymond* was with them), for the plaintiff in error.

The Attorney-General (*Sir F. Kelly*) and *Mr. G. Miller*, for the defendant in error.

The LORD CHANCELLOR (Lord Chelmsford) proposed for the opinion of the judges the following question: "Whether under the circumstances stated in the printed case, the Croydon Local Board of Health is legally liable to the action of the appellant for the abstraction of the water in the manner described?"

Mr. Justice Wightman delivered the unanimous opinion of the judges who had been present at the argument. They answered the question in the negative.¹

LORD CHELMSFORD. My Lords, the question in this case is, whether the plaintiff in error is entitled to claim against the defendant the right to have the benefit of the rain water which falls upon a district of many thousand acres in extent, and percolates through the strata to the River

¹ The opinion of the judges is omitted.

Wandle, increasing the supply of water in the river, and being of sensible value in and towards the working of an ancient mill belonging to the plaintiff. The acts of the defendant by which this underground water was interrupted and prevented from finding its way into the river, were done upon his own land.

It was conceded by the plaintiff in argument, that a landowner had a limited and qualified right to appropriate water, the course of which is invisible and undefined, exactly to the same extent and for the same purposes as he would be entitled to use water flowing in a defined and visible channel. This, it was contended, must be confined to a reasonable use of the water for domestic and agricultural purposes, and perhaps (it was said) according to the opinion of Chancellor Kent, for the purposes of manufacture also. It must further be admitted (and appeared to be so in argument), that in addition to these direct uses to which the water may be diverted, if, in the regular course of mining operations the percolation of underground water is arrested in its progress, and prevented reaching a point where it would have increased a supply which had previously been usefully employed by an adjoining landowner, he can maintain no action for the loss of the water thus cut off from him. A distinction was suggested between such a use as the one last mentioned, where the interception of the water was merely the consequence of operations upon a party's own land, and the present, where the very end and object of the act done was to collect and appropriate the water. And upon the state of things existing in this case, a further distinction was insisted upon between a party sinking a well in his own land for domestic, or agricultural, or manufacturing purposes, and a public board or a water company doing the same thing for sanitary purposes, or for supplying the inhabitants of the neighborhood with water.

Before, however, the plaintiff can question the act of the defendant, or discuss with him the reasonableness of the claim to appropriate this underground water for these purposes (whatever they may be), he must first establish his own right to have it pass freely to his mill, subject only to the qualified and restricted use of it, to which each owner may be entitled through whose land it may make its way. It seems to me that both principle and authority are opposed to such a right.

The law as to water flowing in a certain and definite channel, has been conclusively settled by a series of decisions, in which the whole subject has been very fully and satisfactorily considered, and the relative rights and duties of riparian proprietors have been carefully adjusted and established. The principle of these decisions seems to me to be applicable to all water flowing in a certain and defined course, whether in an open visible stream or in a known subterranean channel; and I agree with the observation of Lord Chief Baron Pollock, in *Dickinson v. The Grand Junction Canal Company*, 7 Exch. 300, 301, "that if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space

a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground." But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which in its natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods or diminished by drought, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land through which the water filters cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? And how far will the right to this water supply extend.

In this case, the water which ultimately finds its way to the River Wandle is strained through the soil of several thousand acres. Are the most distant landowners, as well as the adjacent ones, to be bound, at their peril, to take care to use their lands so as not to interrupt the oozing of the water through the soil to a greater extent than shall be necessary for their own actual wants? For, with Mr. Justice Coleridge, I do not see here "how the ignorance" which the landowner has of the course of the springs below the surface, of the changes they undergo, and of the date of their commencement, "is material in respect of a right which does not grow out of the assent or acquiescence of the landholder, as in the case of a servitude, but out of the nature of the thing itself." 2 H. & N. 191.

This distinction between water flowing in a definite channel, and water whether above or under ground not flowing in a stream at all, but either draining off the surface of the land, or oozing through the underground soil in varying quantities and in uncertain directions, depending upon the variations of the atmosphere, appears to be well settled by the cases cited in argument. In *Rawstron v. Taylor*, 11 Exch. 369, 382, it was held that, in the case of common surface water, rising out of springy or boggy ground, and flowing in no definite channel, the landowner was entitled to get rid of it in any way he pleased, although it contributed to the supply of the plaintiff's mill. And in *Broadbent v. Ramsbotham*, 11 Exch. 602, it was decided that a landowner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented

from reaching a brook, the stream of which had for more than fifty years worked the plaintiff's mill. Baron Alderson, in delivering the judgment of the court in that case says (11 Exch. 615): "No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel."

These cases apply to the right to surface water not flowing in any defined natural watercourse. But, of course, the principles they establish are equally, if not more strongly, applicable to subterranean water of the same casual, undefined, and varying description. This appears clearly to have been the opinion of Lord Chief Justice Tindal and the Court of Exchequer Chamber, in the case of *Acton v. Blundell*, 12 M. & W. 324, 348; for, although the court abstained from intimating any opinion as to what might have been the rule of law if there had been an uninterrupted user for twenty years of the well of the plaintiff, which had been laid dry by the mining operations of the defendant, yet the Chief Justice having prefaced his judgment by stating, that "the question argued had been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to and regulates a watercourse flowing on the surface," he concludes with these words (12 M. & W. 353): "We think that the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action."

The Court of Exchequer, in the present case, gave judgment for the defendants without argument, on the authority of the decision in *Broadbent v. Ramsbotham*. The Court of Exchequer Chamber affirmed that judgment, there having been only one dissentient opinion, which, however, pronounced as it was by a most learned and able judge (Mr. Justice Coleridge), is certainly entitled to the highest respect. The judges, of whose assistance your Lordships have had the advantage, have been unanimous in their agreement with the judgment of the Court of Exchequer Chamber.

Against this concurrence of authority, what is there to be opposed in favor of the plaintiff, but the *Nisi Prius* case of *Balston v. Bensted*, 1 Camp. 463, and the case of *Dickinson v. The Grand Junction Canal Company*, 7 Exch. 282? With respect to *Balston v. Bensted*, it does not appear that the question of the right to water percolating through the strata, as contradistinguished from water flowing in a visible stream, was ever presented to Lord Ellenborough's mind, as it is stated, that the defence was intended to be set up, but that he observed, early in the trial, that there could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it. Whether, by the words, "in any particular manner," his Lordship meant to point to the right claimed in that case, or intended to state a proposition applicable to all water of which there had been a twenty years' enjoyment, from whatever source it might be derived, it is impossible to gather from the report; but the question was never argued; and as, upon proof that the decrease of the water in the plaintiff's bath had been occasioned by the operations in the defendant's quarry, the case was at once referred, it can hardly be urged as any authority at all upon a point of such importance, and which requires so much consideration as that which it is supposed to have decided.

With respect to the case of *Dickinson v. The Grand Junction Canal Company*, upon which the plaintiff also relied, after the observations made upon it by Mr. Justice Cresswell in the Exchequer Chamber, and by Mr. Justice Wightman in delivering the opinion of the judges to this House, it is unnecessary for me to say more than that I entirely agree with them, and think that it can hardly be regarded as a satisfactory decision upon the point now under consideration. It appears to me, that reason and principle, as well as authority, are opposed to the claim of the plaintiff to maintain an action for the interception of the underground water which would otherwise have ultimately found its way to the River Wandle, and that, therefore, the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD WENSLEYDALE. My Lords, this case is of the greatest importance, and requires the most full and attentive consideration. No question that has occurred in my time has been so worthy of the most careful examination; and though we have had a very able argument at the bar from the learned counsel, and we also have been favored with the able and unanimous opinion of six of the judges, pronounced by Mr. Justice Wightman, I must own, speaking for myself, I should still desire further discussion, as I have felt very great difficulty in coming to a conclusion satisfactory to my mind; so many difficulties present themselves on both sides.

As, however, my noble and learned friends who heard the case argued at the bar have not had the same difficulty in deciding that I have, and acquiesce in the propriety of the case being now disposed of, I concur, though not without very serious doubts as to the propriety of the conclusion at which they have arrived.

Besides the opinion of the learned judges, delivered by Mr. Justice Wightman, Baron Bramwell has had the goodness to communicate to me one which he wrote, at the time when I suppose a difference of opinion was expected, and I am much indebted to him, as the subject is discussed by him with much ability.

Your Lordships have, for the first time, to decide the question as to the rights to underground water. There are two conflicting authorities: the case under appeal, and that of *Dickinson v. The Grand Junction Canal Company*, 7 Exch. 282, and your Lordships have to decide between them. It is supposed in the judgment in this case, delivered in the Exchequer Chamber by Mr. Justice Cresswell, that the Court of Exchequer had, in two subsequent cases, *Raustron v. Taylor*, 11 Exch. 369, and *Broadbent v. Ramsbotham*, 11 Exch. 602, 25 Law J., N. S., Ex. 115, decided differently. Those cases are said to be inconsistent with the decision in *Dickinson v. The Grand Junction Canal Company*, and virtually to overrule it. This is certainly a mistake, for having been a party to the judgments in each of those cases, I am sure I at least had no notion of impugning the doctrine which I had joined in laying down before, in the case of *Dickinson v. The Grand Junction Canal Company*, which was not decided without great consideration. In *Broadbent v. Ramsbotham*, it did not appear that any water which percolated the strata would have reached the brook; and I well recollect that, on the argument, I so considered, and therefore that the plaintiff could not recover on the ground on which the case of *Dickinson v. The Grand Junction Canal Company* was decided. The argument of Mr. Cowling, as reported in the 25 Law Journal, 122, Exchequer, which is fuller than that in the 11 Exchequer, was directed to this point. I may add, that the report is more correct than that in the 11 Exchequer, which attributes to me too limited a view of the decision in *Dickinson v. The Grand Junction Canal Company*.

The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure nature*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbor.

The elaborate judgment of Lord Denman in the case of *Mason v. Hill*, 5 B. & Ad. 1, in 1833, reviewed most prior judgments and authorities of importance up to that date, and fully established that proposition. But former authorities, and of a very early date, when carefully considered, really left no room for doubt on this subject.

In the case of *Shury v. Pigott*, decided in 1625, 3 Bulstr. 339, Poph. 166, Palm. 444, Whitlock, Justice, laid it down that "a watercourse differs from a way or common; that it doth not begin by prescription nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted," and he observed that the course of a spring is a natural course and current, and to stop this may be a nuisance to the commonwealth, and a private wrong. And in *Brown v. Best*, 1 Wils. 174, Lord Chief Justice Lee is reported to have said that a watercourse is *jure naturæ*, and therefore a declaration stating merely the possession of the place through which the water used to run is good. And Denison, Justice, said that in natural watercourses that was the most proper mode of declaring.

This decision in the case of *Mason v. Hill* has been followed by many others laying down the same proposition, of which *Wood v. Waud*, 3 Exch. 748, was one. *Mason v. Hill* had been preceded by the case of *Wright v. Howard*, before Vice-Chancellor Sir John Leach, 1 Sim. & S. 190. And it was followed by *Embrey v. Owen*, 6 Exch. 353, and by *Dickinson v. The Grand Junction Canal Company*, 7 Exch. 282.

This position is also established in the American courts, *Tyler v. Wilkinson*, 4. Mason, 400, and sanctioned by the best writers of the highest authority, Kent's Commentaries (3 Kent, Com. 439-455). And it is laid down as the first proposition in the very able treatise on Watercourses by Mr. Angell, an American authority, pages 1, 21, 22. And it has been held in America that the law implied damage from the violation of the right: *vide* Angell on Watercourses, p. 98; *Pastorius v. Fisher*, 1 Rawle, 27,—a matter which has been sometimes doubted, though probably without sufficient reason.

We may consider, therefore, that this proposition is indisputable, that the right of the proprietor to the enjoyment of a watercourse on the surface is a natural right, and not acquired by occupation of the stream itself, or presumed grant. And the expressions used by Mr. Justice Bayley in *Williams v. Morland*, 2 B. & C. 910, and by Lord Chief Justice Tindal in *Liggins v. Inge*, 7 Bing. 682, that water flowing in a stream is *publici juris*, and the property of the first occupier, are founded on a mistake between the property in the water itself and the right to have its continual flow.

The observations, also, of Lord Chief Justice Tindal in the case of *Acton v. Blundell*, 12 M. & W. 324, and of Mr. Justice Maule in *Smith v. Kenrick*, 7 C. B. 515, as to the origin of the right to the continual flow of a superficial stream, being the presumed acquiescence of the proprietors above and below, and which is the foundation of the distinction made by the Lord Chief Justice between those streams and subterranean watercourses, cannot be supported.

Now the right to a natural stream flowing in a definite channel is not confined to streams on the surface, but the right to an underground stream flowing in a known and definite channel is equally a right *ex*

natura, and an incident to the land itself, as a beneficial adjunct to it, as was determined in the case of *Wood v. Waud*, 3 Exch. 748.

If the River Wandle in this case had been supplied by natural streams flowing into the river above ground, or in known definite channels below ground, the cutting off those streams to which the person entitled to the use of the river was entitled *ex natura* as feeders of the river, would be an injury to him, and give a right of action. And if this be true with regard to underground streams finding their way into the river, then comes the difficulty how to distinguish the smaller rivulets, and the drops of water which flow and percolate into and supply the river. They are all equally the gifts of nature for the benefit of the proprietors of the soil through and into which they flow. They are all flowing water, the property in which is not vested in the owner of the soil, any more than the property in the water of a river which flows through it on the surface.

In *Acton v. Blundell* it is said by Lord Chief Justice Tindal, that the case "rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it be solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that he finds to his own purposes, at his free will and pleasure." If this applies to water underground in a natural course of transit (and it must do so to be applicable at all), and not to mere stagnant water, I agree with Mr. Justice Coleridge in his remark, that the reason why it is, as such, more the subject of property than the water flowing above ground, is not explained, 2 H. & N. 192. Surely the use of the flowing water in each case, and not the property in it, belongs to the proprietor of the surface.

As to that part of Mr. Justice Coleridge's opinion in which he relies on the possession of the mill for thirty or sixty years, 2 H. & N. 191, 193, I think he is wrong. I do not think that the principle on which prescription rests can be applied; it has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards: "*qui non prohibet quod prohibere potest, assentire videtur.*" But how here could he prevent it? He could not bring an action against the adjoining proprietor; he could not be bound to dig a deep trench in his own land to cut off the supplies of water, in order to indicate his dissent. It is going very far to say that a man must be at the expense of putting up a screen to window lights to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of user if it does not belong of natural right to the plaintiff. For the same reason I dispute the correctness of Lord Ellenborough's opinion in the case of the spring in *Balston v. Bensted*, 1 Camp. 463, where there had been twenty years' enjoyment

of it in a particular mode. The true foundation of the right is, that it is incident to the land *ex jure nature*.

What, then, is the distinction between superficial streams and subterranean water? With respect to underground waters percolating the strata, two considerations arise which make a material difference between them and the right to superficial streams. In the first place, these subterranean waters cannot be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used, and some mode of reducing into possession must be permitted by law. If there be no such right, underground water is comparatively useless. A man may therefore dig for his own supply, or make a well for his own use and that of his family, and, in so doing, he may deprive his neighbor's land of moisture, and even tap a copious spring, and prevent it from flowing to his neighbor's close. It can rarely happen that in excavating, in order to obtain the use of the water, some injury will not be caused to the subterraneous supplies of a neighbor, especially as the precise course and direction of such water can seldom be known accurately beforehand.

In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and, in so doing, he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbor's land.

In the civil law are to be found many instances in which it is allowed to cut off subterraneous supplies, if it is done in the cultivation of the soil. In the Digest, Dig. 39, 3, 1, § 12, Pothier's ed. 1782, vol. 3, p. 20, it is said: "*Denique Marcellus scribit, Cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo. Et sane actionem non debet habere; si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.*" And a very extensive sense is given to these words, authorizing the improvement of the proprietor's own land, in the civil law. In the same book of the Digest, "*De aqua et aquæ pluvie arcendæ*," Dig. 39, 3, 1, § 9, Pothier's ed. 1782, vol. 3, p. 21, it is said that the making a work "*agri colendi causa et frugum querendarum causa*," and thereby altering the course of the *aquæ pluvie*, is not actionable. The term "*fruges*" is said to be the same as rent: "*Frugem pro redditu appellari, non solum quod frumentis aut leguminibus; verum et quod ex vino, sylvis cæduis, cretifodinis, lapidicinis, capitur.*" It would seem, therefore, that if the sources of a fountain or spring in an adjoining piece of land were cut off by excavating, in order to get the minerals in any place, it would be deemed by the Roman law to fall within the principle of the improvement of the land, and not be actionable.

The case of *Acton v. Blundell* would be rightly decided upon this ground, because the injury to the plaintiff's well was caused by the lawful exercise of the defendant's right to get the minerals in his land;

and unless he had that right, the public would have lost the benefit of a valuable gift of Providence.

We come then to the conclusion, that every man has a right to the natural advantages of his soil — the plaintiff to the benefit of the flow of water in the river and its natural supplies, the defendant to the enjoyment of his land, and to the underground waters on it, and he may, in order to obtain that water, sink a well. But according to the rule of reason and law, *sic utere tuo ut alienum non lædas*, it seems right to hold, that he ought to exercise his right in a reasonable manner, with as little injury to his neighbor's rights as may be. The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbor, *animo vicino nocendi*. The same principle is adopted in the laws of Scotland,¹ where an otherwise lawful act is forbidden "if done in *emulationem vicini*" (Bell's Principles, § 966); but this principle has not found a place in our law.

The question in this case, therefore, as it seems to me, resolves itself into an inquiry, whether the defendant exercised his right of enjoying the subterraneous waters in a reasonable manner. Had he made the well and used the steam-engines for the supply of water for the use of his own property, and those living on it, there could have been no question. If the number of houses upon it had increased to any extent, and the quantity of water for the families dwelling on the property had been proportionately augmented, there could have been no just grounds of complaint. But I doubt very greatly the legality of the defendant's acts in abstracting water for the use of a large district in the neighborhood, unconnected with his own estate, for the use of those who would have no right to take it directly themselves, and to the injury of those neighboring proprietors who have an equal right with themselves. It does not follow that each person who was supplied with water by the defendant could have dug a well himself on his own land, and taken the like quantity of water, so that the defendant may have taken much more than would have been abstracted if each had exercised his own right.

The same objection would not apply to the abstraction of water for the use of the dwellers on the defendant's land, even though they carried on trades requiring more water (breweries, for example) than would be used for mere domestic purposes; it would still be for their purposes only. But in this case there has been an abstraction of water for purposes wholly unconnected with the enjoyment of the defendant's land.

On the whole, I should certainly have wished to give this important case further consideration; but, as my noble and learned friends have formed their opinions upon it, I acquiesce, and do not give my advice to your Lordships to reverse the judgment.

LORD KINGSDOWN. My Lords, I confess that I am unable to share in the doubts that have been expressed by my noble and learned friend

¹ But see *Mayor of Bradford v. Pickles*, [1895] A. C. 587, 597.

opposite in the able and elaborate judgment which he has just delivered. I entirely concur in the opinion which has been given by the judges unanimously in this case, and for the reasons by which that opinion has been supported; and I think the House is greatly indebted to those learned persons for the admirable reasoning by which they appear to have removed all doubt upon one of the most important questions that ever came under the consideration of a court of justice.

LORD CHELMSFORD. My Lords, I ought to have mentioned, that my noble and learned friend, Lord Brougham, who is compelled to leave the House to-day, but who was present during the whole of the argument, entirely concurs in the opinion which I have expressed.¹

Judgment of the Court of Exchequer Chamber affirmed, with costs.

FORBELL v. NEW YORK.

COURT OF APPEALS OF NEW YORK. 1900.

[Reported 164 N. Y. 522.]

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered upon an order made January 9, 1900, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The judgment grants a perpetual injunction restraining the city of New York from operating its engines, driven wells and pumping stations known as the Spring Creek Pumping Station in the borough of Queens, city of New York, on the conduit line near the Kings County boundary line, and awards past damages to the plaintiff in the sum of \$6,000, together with the costs of the action.

The plaintiff was a lessee of certain farming lands situated near Spring Creek within the county of Kings. He used a portion of the lands in question for the purpose of growing celery and water cresses.

The city of Brooklyn constructed a pumping station in the place in question early in 1885, and in 1894 sunk additional wells and made an additional pumping station. The effect of pumping at these stations was to lower the underground water table on this land, and thus made it unfit for the cultivation of celery or water cresses, and the crops failed for many years prior to the commencement of this action in 1898.

John Whalen, Corporation Counsel (*William J. Carr*, of counsel), for appellant.

Charles Coleman Miller, for respondent.

LONDON, J. The defendant makes merchandise of the large quantities of water which it draws from the wells that it has sunk upon its

¹ Lord Cranworth delivered a concurring opinion, which is omitted.

two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land is thereby affected, but does complain and the courts below have found that the defendant exhausts his land of its accustomed and natural supply of underground or sub-surface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown.

The defendant does not take from his own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one in which, because the percolation and course of the sub-surface waters are unobservable from the surface, they are unknown and thus so far speculative and conjectural as to be incapable of proof or judicial ascertainment.

Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the water in its own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiff's land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of underground water. This it has accomplished just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface waters.

That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the plaintiff has or ought to have in the just administration of the law a remedy.

In *Smith v. City of Brooklyn* (160 N. Y. 357), a case in which the defendant, by means of the same acts and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court, in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the defendant would have been liable if it had simply lowered the sub-surface level or body of underground water not contributing to the supply of plaintiff's surface stream or pond.

It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability. *Ellis v. Duncan*, 21 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520; *Village of Delhi v. Youmans*, 45 N. Y. 362; *Phelps v. Nowlen*, 72 N. Y. 40; *Bloodgood v. Ayers*, 108 N. Y. 400; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424.

The earlier cases followed the law as stated in *Acton v. Blundell* (12 Mees. & W. 324) and *Greenleaf v. Francis* (18 Pick. 117). So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to.

The reasons usually assigned for the rule are that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil so long as it remains there is — unlike water flowing in a surface stream — a part of the soil itself. *Barkley v. Wilcox*, 86 N. Y. 140. That a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the sub-surface support or supply of sub-surface water in another parcel; that the percolation and underground flow of water are out of sight and their exact operation and courses are conjectural and not susceptible of actual observation and proof; and finally that the damages, if any, are the remote or indirect consequence of lawful acts.

It may be conceded that these reasons, or some of them, were ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it.

In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized.

In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandizing it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired.

The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We

think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us.

The distinction between a case like this and the cases of percolating waters in which liability has been denied was well pointed out by the learned judge who wrote for the Appellate Division in *Smith v. City of Brooklyn* (18 App. Div. 340). We refer to the opinion as a valuable contribution to the discussion of the subject.

We more readily conclude to affirm, because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes; it does wrong under the letter of the law in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is of vastly more importance than the celery and water cresses of which the plaintiff's land was so productive, before the defendant encroached upon his water supply. But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to the plaintiff.

The judgment should be affirmed, with costs.

PARKER, C. J., BARTLETT, HAIGHT, MARTIN and VANH, JJ., concur;
O'BRIEN, J., not voting.

*Judgment affirmed.*¹

¹ So *Katz v. Walkinshaw*, 141 Cal. 116. See *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569.

As to how far "malice" is material, see *Chatfield v. Wilson*, 28 Vt. 49; *Phelps v. Nowlen*, 72 N. Y. 39; *Mayor of Bradford v. Pickles*, [1896] A. C. 587.

In *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483 (1871), it was held that one cannot, by draining his own land, draw off water running in a defined surface channel on adjoining land. The principle of *Canal Co. v. Shugar* was applied to intercepting percolating waters on their way to a stream, in *Smith v. City of Brooklyn*, 160 N. Y. 357.

In *City of Los Angeles v. Pomeroy*, 124 Cal. 597, in the course of a series of elaborate instructions on the difference between streams and percolating waters, the court said (p. 623): "It does not always follow that water which does not flow on the surface in a visible stream is for that reason not a watercourse, or not a part of the water of a stream which does at some place run on the surface; nor need it flow in a defined channel underground as a solid body of moving water of any particular dimensions in order to constitute a watercourse. If you find from the evidence that there is a bed or a river bottom filled to a considerable depth with sand, gravel, or other porous material, meandering over which a stream runs on the surface, and through and in which the water moves under ground, enough of it rising to the surface to supply the surface stream, and the other portions of the underground water moving with a much less velocity than the surface stream, and through a wider or larger space in and through the interstices of the porous material, but in the same general direction as the surface stream and in connection with it, and in a course and within a space reasonably well defined, the conditions being such that the existence and general direction of the body of water moving underground can be determined with reasonable accuracy, then that portion of the water thus moving

II. SURFACE WATERS.

BROADBENT v. RAMSBOTHAM.

EXCHEQUER. 1856.

[Reported 11 Ex. 602.]

ACTION for diverting water from a mill stream belonging to the plaintiff. A verdict was entered for the plaintiff by consent, subject to special case, to be settled by an arbitrator. The case sufficiently appears in the opinion.¹

Knowles (*R. Hall* and *Pickering* with him), for the plaintiff.

Cowling (*Watson* with him), for the defendants.

Cur. adv. vult.

The judgment of the court was delivered by

ALDERSON, B. In this case we have been relieved from the consideration of the several pleas justifying the abstraction of the water under the provisions of the Huddersfield Waterworks Acts, by the admission very properly made by Mr. Cowling on this argument, that he could not support them; and the questions are now reduced to this one alone, whether the defendant Atkinson has improperly diverted, by the acts which he has undoubtedly done, four sources of water which have, as the plaintiff contends, supplied the Longwood Brook on which his mill is situated. There are three of these included in the first count of the declaration, namely, a pond of six and a half acres,

underground should be considered as a part of the watercourse as well as that part which flows over the surface." This charge was sustained (p. 681). *Cf. Gould v. Eaton*, 111 Cal. 639; *Meyer v. Tacoma Light & Water Co.*, 8 Wash. 144. But where the subterranean water flows in a defined channel, but its course is unknown, there *Chasemore v. Richards*, 7 H. L. C. 349, applies.

If water is set back so as to cause injurious percolation, an action will lie, *Pizley v. Clark*, 35 N. Y. 520; but not if the setting back merely prevents a percolation out, *Harwood v. Benton*, 32 Vt. 724. See *Schuster v. Albrecht*, 98 Wis. 241.

As to responsibility for the escape of waters collected in mining operations, see *West Cumberlan Iron Co. v. Kenyon*, 6 Ch. D. 773; *Jones v. Robertson*, 116 Ill. 543.

As to how far the landowner limits his right to deal with percolating waters by granting a "well" or "spring" to another person, see *Davis v. Spaulding*, 157 Mass. 431; *Wheelock v. Jacobs*, 70 Vt. 162; and see *Ballacorkish Mining Co. v. Harrison*, L. R. 5 P. C. 49.

On correlative rights in an underground stream, see *Willis v. City of Perry*, 92 Iowa, 297.

As to natural gas, mineral oil, etc., see *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317; *People's Gas Co. v. Tyner*, 131 Ind. 277.

POLLUTION OF PERCOLATING WATERS. The statement of Holt, C. J., in *Tenant v. Goldwin*, 1 Salk. 360, that "he whose dirt it is must keep it that it may not trespass," applies to the pollution of percolating waters. *Ballard v. Tomlinson*, 29 Ch. D. 115; *Collins v. Chartiers Gas Co.*, 139 Pa. 111; *Kinnaird v. Standard Oil Co.*, 89 Ky. 468. See *Brown v. Illius*, 27 Conn. 84, 93; *Upjohn v. Richland Township*, 46 Mich. 542, 548.

¹ This statement is substituted for that in the report.

a swamp of about sixteen perches, and a well. The fourth is a well, included in the second count. There is no doubt that in the course of the drainage these sources of water have been diverted, and now fall into the drain made by the defendant. The arbitrator describes them thus: "And, first, as to the six and a half acre pond," he says, "from the sides of the hill called Pighill Wood and Pendle Hill the natural flow of water is northward till it reaches Longwood Brook, and all water passing over the lands there naturally runs down towards and into Longwood Brook. Above Pighill Wood a shallow basin is formed by the land slips which have from time to time occurred, and the water collected in it, if it exceeds the depth of about three feet above the lowest point of the basin, escapes northward and runs down over the surface of the hill towards Longwood Brook. The rest sinks into the ground or remains as a pond in the hollow thus naturally created by the form of the land." Now, we think that this water, both that which overflows and that which sinks in, belongs absolutely to the defendant, on whose land it arises, and is not affected by any right of the plaintiff. The right to the natural flow of the water in Longwood Brook undoubtedly belongs to the plaintiff; but we think that this right cannot extend further than a right to the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel. In this case a basin is formed in his land, which belongs to him, and the water from the heavens lodges there. There is here no watercourse at all. If this water exceeds a certain depth it escapes at the lowest point, and squanders itself (so to speak) over the adjoining surface. The owner of the soil has clearly a right to drain this shallow pond and to get rid of the inconvenience at his own pleasure. We have no doubt, therefore, that, as to this source of feeding the Longwood Brook, the plaintiff has no title. The same may be said of the swamp of sixteen perches, which is merely like a sponge fixed (so to speak) on the side of a hill, and full of water. If this overflows it creates a sort of marshy margin adjoining; and there is apparently no course of water, either into or out of it, on the surface of the land. As to the subterranean courses communicating with this swamp, which must no doubt exist, it is sufficient to say, that they are not traceable, so as to show that the water passing along them ever reaches Longwood Brook. This falls, therefore, into the same category, or rather is a stronger instance of the rule before mentioned. The well at this point is also *in simili*

casu. It is not found in the case that it has any subterraneous communication with Longwood Brook. Indeed, if it had any such communication (inasmuch as the brook seems far below the bottom of this shallow well), the communication would probably draw off all the water in it. It is sufficient, however, to say, that it is not found so to communicate. But no doubt, when this well overflows, the overflow pours itself over and down the declivity towards the brook. But this gives no right to the water, as we have already shown in the case of the six and a half acre pond. These are the three grounds of the plaintiff's complaint in the first count of his declaration. They all seem to us to fail.

We come now to the second count. The stream here said to be diverted is one in which, on the side of a hill, a stream wells out from the ground at a depth of about two feet, and is received into a basin of about three feet square, and used as a watering place for cattle. This stream in dry seasons was somewhat scanty, so as to compel the cattle at those periods to go down on their knees to reach it. At other times it overflowed its basin, and then it ran down part of the way in an open and, as we presume, artificial ditch, for it is described as a ditch beside a hedge. The water lower in its course flows on in a small channel worked by the water and over swampy places where the cattle had trodden in the soil. Still lower down, after passing through one or two fields, it arrives in what is described as a natural valley, and after this it would have probably communicated with Longwood Brook, but for its diversion into the Mill Owners' Compensation Reservoir, which is in fact the same thing.

There is here also, we think, nothing found to take the water from this well out of the same class as the three former cases. We must consider the stream in its beginning, not after it has arrived in the natural valley communicating with the reservoir. If the water, after having arrived there, had been then diverted, the case would be different. The water falling from heaven on the side of a hill, we have before said, may be appropriated, though not after it has once arrived at a defined natural watercourse; and here the question is, whether this water in its first origin, and before it has arrived at any definite natural watercourse conveying it onwards towards Longwood Brook, has not been intercepted by the defendant's drain, and so appropriated by him; and we think it has. For what are the facts? The water in dispute is only the overflow of a well, and the well is now prevented from overflowing. But when before it did overflow it ran into a ditch (the lowest adjoining ground) made artificially, and for a different purpose, running beside a hedge. This was no natural defined watercourse. After this, it squandered itself over a swamp made by the feet of cattle treading about, and it is not till long after this, that what still remained of it found its way into what may there perhaps be correctly called a definite natural watercourse, receiving this and probably other water from other sources also. This part of the case, we think, is

wholly undistinguishable from, and is governed by the decision of this court in, the late case of *Rawstron v. Taylor*, 11 Ex. 369.

This complaint, therefore, fails also. The result is (without going into any question as to this being done by the defendant Atkinson in the rightful exercise of his power of draining his own lands, which probably the pleadings do not raise), that the plaintiff has failed to establish any right to the natural flow of these four streams of water, or any of them, and that on this part of the case our judgment must be for the defendants.

*Judgment for the defendants.*¹

MILLER v. LAUBACH.

SUPREME COURT OF PENNSYLVANIA. 1864.

[Reported 47 Pa. 154.]

THIS was an action on the case by John Laubach against Nathan Miller, to recover damages for injury occasioned by the construction of a drain, whereby, as plaintiff alleged, certain springs of water known as winter springs, which were on defendant's land, rendering a portion of it wet and boggy, but doing no injury to the adjoining lands of plaintiff, were conducted from the springs to the line of Laubach's land, and then passed in a body across the division line, spoiling from one-fourth to one-half an acre of the land of plaintiff.

The defendant pleaded not guilty, and offered evidence to prove that as his land at the spring was some fifteen feet higher than that of plaintiff at the line, the water was only pursuing its natural course, and that as the ditch or drain was dug in the natural channel made by the stream, the injury occasioned by the increased quantity of water thereby thrown on plaintiff's land was not such a one as would entitle the plaintiff to maintain this action.

Under the ruling of the court below (*Maynard*, P. J.), there was a verdict and judgment for plaintiff. This writ was then sued out, and the following error assigned.

The court erred in charging the jury as follows: "If the jury find from the evidence that the defendant did so collect the water from his own land and turn it in a body upon the lands of the plaintiff through an artificial channel made by the defendant, and this was to the injury

¹ See *Ennor v. Barnell*, 2 Giff. 410.

On the distinction between a watercourse and surface water, see *Earl v. De Hart*, 12 N. J. Eq. 280; *Bowlsby v. Speer*, 81 N. J. Law, 351; *Gibbs v. Williams*, 25 Kans. 214; *Bloodgood v. Ayers*, 108 N. Y. 400; *Eulrich v. Richter*, 37 Wis. 228, s. c. 41 Wis. 318. Cf. *Hebron Road v. Harvey*, 90 Ind. 192.

As to cases where a stream spreads for a distance over marshy ground, at the foot of which the waters are again collected, see *Mitchell v. Bain*, 142 Ind. 604.

and damage of the plaintiff, he is entitled to recover such damages as you believe from the evidence he has sustained."

Edward J. Fox and *A. J. Knecht*, for plaintiff in error.

H. D. Maxwell and *M. H. Jones*.

The opinion of the court was delivered, April 2d, 1864, by

THOMPSON, J. The portion of the charge to the jury in this case complained of as erroneous, is as nearly in accordance with the doctrine laid down in *Kauffman v. Griesmer*, 2 Casey, 407, and *Martin v. Riddle*, reported in a note thereto at page 405, as possible or necessary. The grounds of recovery on the part of plaintiff, and on which there was a very decided preponderance of testimony, was, that there was wet or marshy ground on the defendant's land, occasioned by what was called winter springs by some of the witnesses, and which only saturated the earth without running off by a defined channel. To remedy this the defendant constructed a drain through the land thus saturated to the plaintiff's land, and there discharged the water which was accustomed to remain on his own, until carried off by evaporation. The plaintiff complained and proved that this rendered his land to the extent of from one-fourth to one-half acre wet and worthless. It was of such a state of facts that the learned judge said: "If the jury find from the evidence that the defendant did so collect the water from his own land, and turn it in a body upon the lands of the plaintiff, through an *artificial* channel made by the defendant, and this was to the injury and damage of the plaintiff, he is entitled to recover such damages as you believe from the evidence he has sustained." This is just the doctrine of the cases cited, and certainly the law of such a case.

No doubt the owner of land through which a stream flows, may increase the volume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation reasonably used as the stream may give him. But that is an entirely different thing from draining the water standing on the lands of one, through artificial channels, on to that of another. That cannot be done without his consent, and this was the substance of the charge below.

*There was no error, and the judgment is affirmed.*¹

¹ See *Schuster v. Albrecht*, 98 Wis. 241. But see *Shoshan v. Flynn*, 59 Minn. 436; *Hughes v. Anderson*, 68 Ala. 280.

HURDMAN v. NORTH EASTERN RAILWAY COMPANY.

COURT OF APPEAL. 1878.

[Reported 3 C. P. Div. 168.]

APPEAL from the judgment of *Manisty*, J., in favor of the plaintiff on demurrer to a statement of claim.

Claim: — At the time of the damage hereafter mentioned the plaintiff was, and is still, possessed of a house, No. 16, Lodge Terrace, Sunderland.

2. The defendants then were, and still are, possessed of a certain close of land adjoining the house of the plaintiff.

3. The defendants placed and deposited in and upon the close of the defendants, and upon and against a wall of the defendants which adjoins and abuts against the house of the plaintiff, large quantities of soil, clay, limestone, and other refuse, close to and adjoining the house of the plaintiff, and thereby raised the surface of the defendants' land above the level of the land upon which the plaintiff's house was built.

4. The rain which fell upon the soil, clay, limestone, and other refuse so placed as aforesaid oozed and percolated through the wall of the defendants into the house of the plaintiff, and the plaintiff's house thereby became wet, damp, unwholesome, and unhealthy, and less commodious for habitation.

5. By reason of the acts of the defendants the walls of the house of the plaintiff became and were very much injured, and the paper upon the walls has been destroyed.

6. In the alternative the plaintiff alleges that the defendants negligently and improperly placed and deposited the soil, clay, limestone, and refuse upon the defendants' land, and that the rain water falling thereon oozed and percolated through and into the plaintiff's house, whereby the plaintiff's house was damaged as before mentioned.

7. In the alternative the plaintiff alleges that the defendants were guilty of negligence in this, that the wall of the defendants against which the defendants so placed the soil, clay, limestone, and refuse was not sufficiently and properly constructed and built so as to prevent the water falling upon the soil, clay, limestone, and refuse from oozing and percolating through the wall and into the plaintiff's house, and that the defendants were guilty of negligence in placing the soil, clay, limestone, and refuse against the wall being so insufficient to prevent the water falling upon the soil, clay, limestone, and refuse from oozing and percolating through and into the plaintiff's house, whereby the plaintiff's house was damaged.

Demurrer to the claim, on the ground that the acts, matters, and things alleged to have been done by the defendants do not give rise to any right of action on the part of the plaintiff.

Herschell, Q. C., and *G. Bruce*, for the defendants in support of the demurrer.

Waddy, Q. C., and *John Edge*, for the plaintiff, *contra*.

The judgment of the court (*BRAMWELL*, *BRETT*, and *COTTON*, L. JJ.) was delivered by

COTTON, L. J. In this case the plaintiff has brought an action for injury alleged to have been caused to his house, which abuts on a wall of the defendants, by certain acts done by the defendants on their own land. The question is raised on demurrer to the statement of claim, and the question therefore is whether that alleges a good cause of action. [The Lord Justice read the statement of claim, except paragraph 7.] It is unnecessary to read the seventh paragraph, because it is based on a supposed obligation of the railway company to make their wall water-tight, but in our opinion there is no such obligation, and if the statements contained in the preceding paragraphs do not show a cause of action, the statements of the seventh paragraph do not enable the plaintiff to sustain this action.

For the purposes of our decision, we must assume that the plaintiff has sustained substantial damage, and we must construe the statement as alleging that the surface of the defendants' land has been raised by earth and rubbish placed thereon, and that the consequence of this is that rain-water falling on the defendants' land has made its way through the defendants' wall into the house of the plaintiff, and has caused the injury complained of. The question is, Are the defendants, admitting this statement to be true, liable to the plaintiff? and we are of opinion that they are. The heap or mound on the defendants' land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against any one who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if any one by artificial erection on his own land causes water, even though arising from natural rain-fall only, to pass into his neighbor's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured, and this view agrees with the opinion expressed by the Master of the Rolls in the case of *Broder v. Saillard*, 2 Ch. D. at p. 700. I have limited this statement of liability to liability for allowing things in themselves offensive to pass into a neighbor's property, and for causing by artificial means things in themselves inoffensive to pass into a neighbor's property to the prejudice of his enjoyment thereof, because there are many things which when done on a man's own land (as building so as to interfere with the prospect, or so as to obstruct lights not ancient) are not actionable, even though they interfere with a neighbor's enjoyment of his property. But it is urged that this is at variance with the decision that if, in consequence of a mine-owner on the rise working

out his minerals, water comes by natural gravitation into the mines of the owner on the deep, the latter mine-owner cannot maintain any action for the loss which he thereby sustained. But excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbor of his land, and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled), is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbor of his land. That this is the principle of these cases appears from the case of *Wilson v. Waddell*, 2 Ap. Cas. 95, and from what is said by the Lord Chancellor in *Fletcher v. Rylands*, Law Rep. 3 H. L. C. 330. Moreover, the cases referred to have laid down that a mine-owner is exempt from liability, for water which in consequence of his works flows by gravitation into an adjoining mine, only if his works are carried on with skill and in the usual manner; and in the present case it is stated that the defendants have conducted this operation negligently and improperly. The decisions, therefore, as regards the rights of adjoining mine-owners, do not enable the defendants to discharge themselves from liability.

It was also argued that a landowner, who by operations on his own land drains the water percolating underground in the property of his neighbor, is not liable to an action by the man whose land is thus deprived of its natural moisture, and this it was argued was inconsistent with a judgment for the plaintiff on a statement alleging as a cause of action an alteration in the percolation of water. It is sufficient to say that no one can maintain an action unless there is some injury to something to which the law recognizes his title, and the law does not recognize any title in a landowner to water percolating through his property underground and in no definite channel.

We are of opinion that the maxim *Sic utere tuo ut alienum non lædas* applies to and governs the present case, and that as the plaintiff by his statement of claim alleges that the defendants have by artificial erections on their land caused water to flow into the plaintiff's land, in a manner in which it would not but for such erection have done, the defendants are answerable for the injury caused thereby to the plaintiff.

*Judgment affirmed.*¹

¹ "In respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it." DARTO, Ch. J., in *Goodale v. Tuttle*, 29 N. Y. 459, 467 (1864). But see *Adams v. Walker*, 24 Conn. 463.

J

BARKLEY v. WILCOX.

COURT OF APPEALS OF NEW YORK. 1881.

[Reported 86 N. Y. 140.]

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 8, 1879, which affirmed a judgment in favor of plaintiff entered upon the report of a referee. (Reported, 19 Hun, 320.)

This action was brought to recover damages for injuries alleged to have been sustained by the obstruction of the natural flow of surface water from plaintiff's lot over and across that of defendant.

The facts are sufficiently stated in the opinion.

C. E. Cuddeback, for appellant.

J. M. Allerton, for respondent.

ANDREWS, J. This is not the case of a natural watercourse. A natural watercourse is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a watercourse that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural watercourse, because in times of drought, the flow may be diminished, or temporarily suspended. It is sufficient if it is usually a stream of running water. (Angell on Watercourses, § 4; *Luther v. The Winnisimmet Co.*, 9 Cush. 171.)

The parties in this case own adjacent lots on a street near a village, but not within the corporate limits. The findings are, that the natural formation of the land was such, that surface water from rains and melting snows would descend from different directions, and accumulate in the street in front of the plaintiff's lot, in varying quantities according to the nature of the seasons, sometimes extending quite back upon the plaintiff's lot; that in times of unusual amount of rain, or thawing snow, such accumulations, before the grading of the defendant's lot, were accustomed to run off over a natural depression in the surface of the land across the defendant's lot, and thence over the lands of others, to the Neversink River; that when the amount of water was small, it would soak away in the ground; that in 1871, the defendant built a house on his lot, and used the earth excavated in digging the cellar to improve and better the condition of his lot, by grading and filling up the lot and sidewalk in front of it, about twelve inches, and on a subsequent occasion he filled in several inches more; that in the spring of 1875 there was an unusually large accumulation of water from melting snow and rains in front of, and about the plaintiff's premises, so that the water ran into the cellar of his house, and occasioned serious damage; that the filling in of the defendant's lot had the effect to increase the accumulation of water on the plaintiff's lot, and contributed to the injury to his property.

There was no natural watercourse over the defendant's lot. The surface water, by reason of the natural features of the ground, and the force of gravity, when it accumulated beyond a certain amount in front of the plaintiff's lot, passed upon, and over the lot of the defendant. The discharge was not constant, or usual, but occasional only. There was no channel or stream, in the usual sense of those terms. In an undulating country, there must always be valleys and depressions, to which water, from rains or snow, will find its way from the hill-sides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions, watercourses. Whether, when the premises of adjoining owners are so situated, that surface water falling upon one tenement, naturally descends to and passes over the other, the incidents of a watercourse apply to, and govern the rights of the respective parties, so that the owner of the lower tenement may not, even in good faith and for the purpose of improving or building upon his own land, obstruct the flow of such water to the injury of the owner above, is the question to be determined in this case. This question does not seem to have been authoritatively decided in this State. It was referred to by Denio, Ch. J., in *Goodale v. Tuttle*, 29 N. Y. 467, where he said: "And in respect to the running off of surface-water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule, that the owner of land has full dominion over the whole space above and below the surface." The case in which these observations were made did not call for the decision of the question, but they show the opinion of a great judge upon the point now in judgment. Similar views have been expressed in subsequent cases in this court, although in none of them, it seems, was the question before the court for decision. (*Vanderwiele v. Taylor*, 65 N. Y. 341; *Lynch v. The Mayor*, 76 Id. 60.) The question has been considered by courts in other States, and has been decided in different ways. In some, the doctrine of the civil law has been adopted as the rule of decision. By that law, the right of drainage of surface waters, as between owners of adjacent lands, of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude. (Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; Domat [Cush. ed.], 616; Code Napoléon, art. 640; Code Louisiana, art. 656.) The courts of Pennsylvania, Illinois, California, and Louisiana, have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri.¹ (*Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Griesemer*,

¹ So *Nininger v. Norwood*, 72 Ala. 277; *Mayor of Albany v. Sikes*, 94 Ga. 80; *Lambert v. Alcorn*, 144 Ill. 813, 326; *Boyd v. Conklin*, 54 Mich. 683; *Porter v. Durham*, 74 N. C. 767; *Louisville & N. R. R. Co. v. Hays*, 11 Lea, 382. See *Baker v. Allen*, 66 Ark. 271.

Id. 407; *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 Id. 158; *Ogburn v. Connor*, 46 Cal. 846; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hays v. Hays*, 19 La. 351; *Butler v. Peck*, 16 Ohio St. 334; *Laumier v. Francis*, 23 Mo. 181.¹) On the other hand, the courts of Massachusetts, New Jersey, New Hampshire, and Wisconsin,² have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not by the common law³ apply between adjoining lands of different owners, so as to give the upper proprietor the legal light, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs, or prevents, the surface water from passing thereon from the premises above to the injury of the upper proprietor. (*Luther v. The Winnisimmet Co.*, 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Id. 106; *Bowlsby v. Spear*, 2 Vroom, 351; *Pettigrew v. Evansville*, 25 Wis. 223; *Hoyt v. Hudson*, 27 Id. 656; *Swett v. Cutts*, 50 N. H. 439.) It may be observed that in Pennsylvania, house lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that State, in respect to surface drainage. (*Bentz v. Armstrong*, 8 Watts & S. 40.) And in *Livingston v. McDonald*, 21 Iowa, 160, the court, in an opinion by Dillon, J., after stating the civil law doctrine, say, that it may be doubted whether it will be adopted by the common law courts of this country, so far as to preclude the lower owner from making in good faith improvements which would have the effect to prevent the water of the upper estate from flowing or passing away. Professor Washburn states, that the prevailing doctrine seems to be that if for the purposes of improving and cultivating his land, a landowner raises or fills it, so that the water which falls in rain or snow upon an adjacent owner's land, and which formerly flowed on

¹ But see *Abbott v. Kansas City, &c. Ry. Co.*, 83 Mo. 271, *contra*.

² So *Chadeayne v. Robinson*, 55 Conn. 345; *Cedar Falls v. Hansen*, 104 Iowa, 189; *Mo. Pac. Ry. Co. v. Keys*, 55 Kan. 206; *Murphey v. Kelley*, 68 Me. 521; *Walker v. So. Pac. R. R.*, 165 U. S. 508, 602 (N. M.); *Baltzger v. Carolina Midl. Ry. Co.*, 54 S. C. 242; *Cass v. Dicks*, 14 Wash. 76. See *Jacobson v. Van Boesing*, 48 Neb. 80.

As to the collection of surface water by a system of drainage, see *West Orange v. Field*, 37 N. J. Eq. 600.

³ "After a careful, diligent, and somewhat extensive, though not completely exhaustive, search among the old English reports and law-writers, we have been unable to find any distinct, clear and definite statement of what was, [prior to May 14, 1776,] the common law applicable to the precise question involved in the present case. We are, perhaps, perfectly safe in saying that there was not in England, prior to the beginning of the American Revolution, any such authoritative announcement, judicial or otherwise, of the rule concerning surface waters now insisted upon by the plaintiff in error, as to make the same binding upon us." LUMPKIN, J., in *Mayor of Albany v. Sikes*, 94 Ga. 30, 34 (1894). And see *Boyd v. Conklin*, 54 Mich. 588.

to the first mentioned parcel, is prevented from so doing, to the injury of the adjacent parcel, the owner of the latter is without remedy, since the other party has done no more than he had a legal right to do. (Wash. on Easements [2d ed.], 431.)

Upon this state of the authorities, we are at liberty to adopt such rule on the subject as we may deem most consonant with the demands of justice, having in view on the one hand individual rights, and on the other the interests of society at large. Upon consideration of the question, we are of opinion that the rule stated by Denio, Ch. J., in *Goodale v. Tuttle*, is the one best adapted to our condition, and accords with public policy, while at the same time it does not deprive the owner of the upper tenement of any legal right of property. The maxim, *Aqua currit et debet currere ut currere solebat*, expresses the general law which governs the rights of owners of property on watercourses. The owners of land on a watercourse are not owners of the water which flows in it. But each owner is entitled by virtue of his ownership of the soil to the reasonable use of the water as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream by owners above and below him. Such use is incident to his right of property in the soil. But he cannot divert, or unreasonably obstruct, the passage of the water to the injury of other proprietors. These familiar principles are founded upon the most obvious dictates of natural justice and public policy. The existence of streams is a permanent provision of nature, open to observation by every purchaser of land through which they pass. The multiplied uses to which in civilized society the water of rivers and streams is applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by any individual of the water in a natural watercourse, or any unreasonable interruption in the flow. It is said, that the same principle of following the order of nature should be applied between coterminous proprietors, in determining the right of mere surface drainage. But it is to be observed, that the law has always recognized a wide distinction between the right of an owner to deal with surface water falling or collecting on his land, and his right in the water of a natural watercourse. In such water, before it leaves his land and becomes part of a definite watercourse, the owner of the land is deemed to have an absolute property, and he may appropriate it to his exclusive use, or get rid of it in any way he can, provided only that he does not cast it by drains, or ditches, upon the land of his neighbor; and he may do this, although by so doing he prevents the water reaching a natural watercourse, as it formerly did, thereby occasioning injury to mill-owners, or other proprietors on the stream. So also he may by digging on his own land intercept the percolating waters which supply his neighbor's spring. Such consequential injury gives no right of action. (*Acton v. Blundell*, 12 M. & W. 324; *Raveston v. Taylor*, 11 Exch. 369; *Phelps v. Nowlen*, 72 N. Y. 39.) Now, in these cases there is an interference

with natural laws. But those laws are to be construed in connection with social laws and the laws of property. The interference in these cases with natural laws is justified, because the general law of society is, that the owner of land has full dominion over what is above, upon, or below the surface, and the owner in doing the acts supposed, is exercising merely a legal right. The owner of wet and spongy land cannot, it is true, by drains or other artificial means, collect the surface water into channels and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law. (Corp. Jur. Civ. 89, tit. 3, §§ 2, 3, 4, 5; *Noonan v. City of Albany*, 79 N. Y. 475; *Miller v. Laubach*, 47 Penn. St. 154.) But it does not follow, we think, that the owner of land, which is so situated that the surface waters from the lands above naturally descend upon and pass over it, may not in good faith, and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. There is a manifest distinction between casting water upon another's land, and preventing the flow of surface water upon your own. Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed in respect to surface drainage, would, we think, place undue restriction upon industry, and enterprise, and the control by an owner of his property. Of course in some cases the opposite principle may cause injury to the upper proprietor. But the question should, we think, be determined largely upon considerations of public policy and general utility. Which rule will on the whole best subserve the public interests and is most reasonable in practice? For the reasons stated, we think the rule of the civil law should not be adopted in this State. The case before us is an illustration of the impolicy of following it. Several house lots (substantially village lots) are crossed by the depression. They must remain unimproved if the right claimed by the plaintiff exists. It is better, we think, to establish a rule which will permit the reclamation and improvement of low and waste lands, to one which will impose upon them a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors. We do not intend to say that there may not be cases which, owing to special conditions and circumstances, should be exceptions to the general rule declared. But this case is within it, and we think the judgment below should be affirmed.

All concur.

*Judgment affirmed.*¹

¹ In Minnesota the disposition of surface water is regulated by a reasonable use of the land. *Sheehan v. Flynn*, 59 Minn. 436. And see *Rindge v. Sargent*, 64 N. H. 294.

J

GANNON v. HARGADON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1865.

[Reported 10 All. 106.]

TORT to recover damages for turning a stream of water so that it flowed upon the plaintiff's close in West Newton.

At the trial in the Superior Court, before *Brigham, J.*, the evidence tended to show that the defendant owned a lot of land lying to the west of the plaintiff's; that along the easterly line of the defendant's lot there was a way, which extended further to the north; that on the west side of the way, and north of the defendant's lot, a ditch was dug in 1863 which extended down to within a few feet of the defendant's lot; that a few feet below the northerly line of the defendant's lot there was a low place in the way, below which deep ruts had been made; that in March 1863 the melting of the snow and the spring rains caused a considerable flow of surface water from the land to the north of the defendant's lot, through the ditch, and over the way and through the ruts upon the defendant's lot; and that the defendant thereupon placed turfs in the ruts just below the low place in the way, and upon his own land, for the purpose of protecting the way from injury, and thereby caused the water to flow off upon the plaintiff's land.

The defendant asked the court to instruct the jury as follows: "If the defendant placed sods in the cart ruts upon the way over his own land from time to time as the ruts were made by the passing of the cart, and he did this merely to prevent the water from making channels of such ruts, and gulying, washing away and injuring said way and the land of the defendant, and such water was not that of a watercourse, but merely surface water caused by the melting of snows and the fall of rains in the spring, and flowed on to the defendant's land from land above his own, and if in consequence of the placing of said sods the said water which would otherwise have run down said ruts was diverted upon the plaintiff's land, the defendant is not liable therefor. The plaintiff had no right that the ruts made on the defendant's land should be kept open."

The judge declined so to rule, and instructed the jury as follows: "The plaintiff and defendant, being conterminous proprietors, had each the right to develop, improve and enjoy his own estate; and if, as an incident to the exercise of this right, the estate of the other was injured, he would have no legal remedy for such injury. Each, on his own estate, might do acts to prevent the other's exercise of this right from being injurious to him; and if in so doing the other's development, improvement and enjoyment of his estate was restricted, for such restrictions, if injurious, he would have no legal remedy. But neither would have the right to transfer or divert a cause of injury to him, arising

from the exercise of the right stated, by the other, to another conterminous proprietor.

“To apply these principles to the present case. The defendant, for the purpose of repairing and enjoying the way over his estate, had a right to exclude surface water from his estate and from his way, which flowed from conterminous estates; and if as an incident to the exercise of this right such surface water flowed upon the plaintiff's land, the plaintiff has no remedy against the defendant; if the defendant failed to exercise this right, and the consequence of this failure was that water flowed from estates conterminous to that of the defendant upon the defendant's land, and thence upon the plaintiff's land, to his injury, he would have no remedy against the defendant; but if surface water flowing from land conterminous with the land of the defendant upon the defendant's land, which water in its natural course would not have flowed upon the plaintiff's land, was by the act of the defendant diverted thence upon the plaintiff's land to his injury, the plaintiff would have a remedy against the defendant for such injury, notwithstanding the act of diverting such surface water by the defendant was an act of repair of his way, and was for the purpose of preventing said way from being injured by such surface water.”

The judge further instructed the jury that “the defendant could have prevented the water from coming upon his own land, and if in doing so he had diverted the water upon the land of the plaintiff, he would not be liable for so doing; but if the defendant suffered the water to flow in upon his land, then the case was different, and having once suffered the water to come upon his land, if he diverted it upon the land of the plaintiff, to his injury, where it would not have gone in its natural course, he was liable; and if the turfs placed in the ruts by the defendant caused water thus to flow upon the plaintiff's land which but for said turfs would not have gone there, then the defendant is liable.”

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

D. E. Ware, for the defendant.

J. Rutter, for the plaintiff.

BIGELOW, C. J. It seems to us that the instructions for which the defendant asked should have been given, and that those under which the case was submitted to the jury were not in accordance with the principles recognized and adopted in cases recently adjudicated by this court. The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the

same in greater quantities or in other directions than they were accustomed to flow. *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19. The point of these decisions is, that where there is no watercourse by grant or prescription, and no stipulation exists between conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. *Cujus est solum, ejus est usque ad cælum*, is a general rule, applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. This principle seems to have been lost sight of in the instructions given to the jury. While the right of the owner of land to improve it and to change its surface so as to exclude surface water from it is fully recognized, even although such exclusion may cause the water to flow on to a neighbor's land, it seems to be assumed that he would be liable in damages, if, after suffering the water to come on his land, he obstructed it and caused it to flow in a new direction on land of a conterminous proprietor where it had not previously been accustomed to flow. But we know of no such distinction. A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damage to adjacent land, it is *damnum absque injuria*. On this point the instructions were clearly erroneous.

*Exceptions sustained.*¹

¹ *Bates v. Smith*, 100 Mass. 181, acc.; and see *Hawley v. Sheldon*, 64 Vt. 491.

One may drain into a watercourse on his own land, surface and other waters of which such watercourse is the natural outlet; but one cannot by artificial arrangements concentrate and discharge these waters in quantities beyond the natural capacity of the stream, to the damage of other owners. *McCormick v. Horan*, 81 N. Y. 86; *Mayor of Balt. v. Appold*, 42 Md. 442; *Jackman v. Arlington Mills*, 137 Mass. 277. Cf. *Mizell v. McGowan*, 120 N. C. 134.

BATES v. SMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[Reported 100 Mass. 181.]

TORT against the members of the parish committee of the First Parish in Dedham, for trespassing on the plaintiff's close adjoining the burial ground of the defendants' parish, and digging away an embankment there built by the plaintiff to protect his land from the flow of surface water from lands adjoining. The defendants answered, admitting that they entered the plaintiff's close and dug a small trench through his embankment; and alleged "that there was a valley in the land of the burial ground, sloping down to the close of the plaintiff, which valley extended, still sloping, down through the close; that there was, on one side of the valley in the burial ground, a row of seven ancient tombs, for the burial of the dead, the tops of the sills and the bottoms of the doors of which were several inches lower than the top of the embankment on the plaintiff's close, which embankment was recently erected; that one of the tombs was and had been for many years owned by the parish and used as a receiving tomb; that the bottoms of the tombs were about two feet below the top of the sills; that at the time of the alleged trespass there was a freshet, caused by heavy rains and the melting of a great body of snow upon the ground, and by reason of the embankment there was a great accumulation of water above the embankment and in the valley in the burial ground; that said water had risen so high that it was on the point of flowing over the tops of the sills of said tombs; that there were in all of said tombs, except the receiving tomb, many dead bodies permanently buried, and in the receiving tomb a great number of dead bodies of persons who had died during the winter, temporarily deposited there until the ground should thaw out so that they could be buried; that in said state of the water and the tombs, they, as the parish committee, entered upon the close of the plaintiff, and dug the trench through the embankment, to prevent the tombs from being inundated with the water raised by said embankment, and desecrated, and to prevent a violation of the Gen. Sts. c. 28, § 12; and that in so doing they did no unnecessary injury to the close, and nothing more than was necessary to prevent the inundation and desecration of the tombs."

Under an agreement that the allegations of the declaration and answer should be taken as agreed facts, the case was submitted in the superior court to the determination of the court, without a jury; which ordered judgment for the plaintiff, and assessed damages in the sum of five dollars; and the defendants appealed.

W. Gaston & F. D. Ely, for the plaintiff.

W. Colburn, for the defendants.

CHAPTER III.

EASEMENTS.

SECTION I.

CUSTOMARY RIGHTS.

ABBOT v. WEEKLY.

KING'S BENCH. 1665.

[Reported 1 Lev. 176.]

TRESPASS for breaking his close; the defendant prescribes, That all the inhabitants of the vill, time out of memory, &c., had used to dance there at all times of the year at their free will, for their recreation, and so justifies to dance there: issue was on the prescription, and a verdict for the defendant, and to save his costs the plaintiff moved in arrest of judgment, that this prescription to dance in the freehold of another, and spoil his grass, was void, especially as it is laid, viz. at all times of the year, and not at seasonable times; and that 't was also ill laid in the inhabitants, who although they may prescribe in easements, as 6 Co. *Gateward's Case*, and some other books are, yet they ought to be easements of necessity, as ways to a church, &c., and not for pleasure only, as this case is. Secondly, If it be good, it ought to have been laid by way of custom in the town, and not by prescription in the persons; and a case was cited, where 't was so adjudged on a demurrer; but by the court this is a good custom, and it is necessary for inhabitants to have their recreation. And as to the second, that though perhaps it had been ill on a demurrer, yet issue being taken thereon, and found for the defendant, 't is good; and judgment was given for the defendant.¹

¹ See *Fitch v. Rawling*, 2 H. Bl. 393; *Mounsey v. Ismay*, 1 H. & C. 729; 3 H. & C. 486; *Hall v. Nottingham*, 1 Ex. D. 1; *Edwards v. Jenkins*, [1896] 1 Ch. 308, and comment in 31 L. J. (newspaper) 538; Gray, *Perp.* §§ 572-576.

A custom may exist in favor of a certain class of persons; e. g., all persons carrying on a certain trade or occupation. *Tyson v. Smith*, 9 A. & E. 406. In this case it was suggested that there might be a customary right to a *profit à prendre*, if compensation were paid; but it seems never to have been so held.

ACKERMAN v. SHELPH.

SUPREME COURT OF NEW JERSEY. 1825.

[Reported 3 Halst. 125.]

THIS was an action of trespass brought by Ackerman against Shelp for entering his close and pulling down and removing his fence.

The defendant pleaded the general issue, and gave notice with it of the special matter which he intended to offer in evidence. The notices were in substance as follows:¹

4. That there is, and from time whereof the memory of man runneth not to the contrary hath been, a laudable custom used and approved of by all the inhabitants of the town of Aquackanunck to pass and repass into and over the said close to the said Passaic River to water.

6. That there was, and from time immemorial had been, a custom for all persons taking lumber to Aquackanunck for market, to store it on the *locus in quo* until it should be carried aboard of vessels for transportation to market.

7. That John Van Wagoner is seised in his demesne as of fee of and in a certain messuage with the appurtenances adjoining the said close, and that the said John and all those whose estate he hath, from the time whereof the memory of man runneth not to the contrary, have been used and accustomed to have a right of way over and upon the said close, for himself and his tenants and cattle, &c., and that the defendant is tenant of the said messuage with the appurtenances, &c.

There was also another action between the same parties for a trespass upon the same premises to which the defendant had pleaded the general issue and given notices. The second and fifth notices in this second action were the same in substance as the sixth and seventh notices above stated.

Van Arsdale, for the plaintiff, now moved to strike out the notices.

Frelinghuysen and *Hornblower*, contra.

FORD, J.² The fourth notice alleges a *custom* in Aquackanunck for the inhabitants of the town to take their cattle over the *locus in quo* to water; the sixth alleges a *custom* for all persons taking lumber to Aquackanunck for market, to store it on the *locus in quo* till it shall be carried on board of vessels for transportation to market; and the seventh alleges a prescription in the *que estate* for a right of way to water over the *locus in quo*.

I will not consume much time in remarking that a right to store

¹ The first, second, third, and fifth notices are omitted.

² Only that part of the opinion is printed which deals with the fourth, sixth, and seventh notices in the first action, and the second and fifth notices in the second action.

lumber, is a *profit* in another's soil that must be prescribed for in a *que estate* and cannot be claimed by custom (6 Co. 59 b; 4 T. Rep. 718); because I place my objection to these three notices on another ground, which is that "so much of the common law" as respects rights accruing by custom and prescription has not been "heretofore practised" in New Jersey (Cons. of N. J. § 22), and these doctrines could not now be introduced without doubtful if not dangerous consequences. The country could not have progressed till this time without a single instance of a right being established on either of these grounds in our courts of justice, if these doctrines had been received here with the common law. "'Time of memory' hath been long ago ascertained by law to commence from the beginning of the reign of Richard the First, and any custom may be *destroyed* by evidence of its non-existence in any part of the long period from that time to the present" (2 Bl. Com. 31). This is sufficient to destroy all common law customs in New Jersey, for the country was not discovered by civilized inhabitants, and civil rights could not consequently have been in use, till more than three hundred years after the beginning of the reign of Richard the First. In most towns standing on navigable water are many uninclosed water lots not applicable to agriculture nor wanted for commercial purposes as yet, over which the inhabitants have been never restrained from passing or driving their cattle to water; and if custom (which is a local law founded on universal usage, and can no more be released than any other law) is to prevail according to the common law notion of it, these lots must lie open forever to the surprise of unsuspecting owners, and to the curtailing commerce, in its more advanced state, of the accommodation of docks and wharves, when perhaps a tenth part of the lots now open would be all sufficient as watering places: a principle of such extensive operation ought not to be strained beyond the limits assigned to it in law. If public convenience requires highways to church, school, mill, market or water, they are obtainable in a much more direct and rational manner under the Statute than by way of immemorial usage and custom. I must not be understood to mean that the uninterrupted enjoyment of an easement in another person's soil for twenty or thirty years, or perhaps a less period of time, will not be evidence for a jury to presume a grant or dedication of such easement, after duly considering such explanations, reasons, and opposing circumstances as the case may afford. Usage *beyond* time of legal memory and usage *within* memory depend on principles and evidence totally distinct from each other. If the defendant relies on usage for a *definite period of time*, he ought to amend his notice so as to correspond with the evidence he means to offer; it can answer no purpose of justice or candor to give notice of one thing and prove another. I am of opinion, therefore, as to these three notices, that the rights therein set up cannot be maintained in the *form* nor on the *principle* therein stated, and that they ought to be stricken out.

In a second action between the parties, wherein the defendant sets up

in his second notice a *custom* by immemorial usage, and in the fifth a *prescription* in the *que estate*, I need only observe that they ought to be stricken out for the reasons before mentioned.¹

SECTION II.

EASEMENTS IN GROSS.

ACKROYD v. SMITH.

COMMON PLEAS. 1850.

[Reported 10 C. B. 164.]

CRESSWELL, J.,² delivered the judgment of the court.³

This was an action of trespass, for breaking and entering a close of the plaintiff, in the parish of Bradford, in the county of York, describing it by abutments, and with feet in walking, and with horses, carts, and carriages, damaging and spoiling the grass, &c.

The defendant pleaded — amongst other pleas — that, long before and at the time of committing the alleged trespasses in the declaration mentioned, and at the time of making the release and grant thereafter mentioned, there was, and thenceforth continually had been, and still was, and at the several times, &c., was, in and upon the said close in which, &c., a certain road, running between a certain other road called “The Bradford and Thornton turnpike-road,” and a certain lane called “Legram’s Lane;” that, long before and at the time of making the indenture of release and grant thereafter mentioned, to wit, on, &c., one Ellis Cunliffe Lister was seised in his demesne as of fee, as well of the soil of the road in that plea first mentioned, as of and in the close in which, &c.; that, before the time of committing the trespasses, the said Ellis Cunliffe Lister was also seised in his demesne as of fee of and in the lands, tenements, hereditaments, and premises in the thereafter next mentioned indenture of release and grant mentioned, and therein and thereby released and conveyed to John Smith; that, afterwards, and before any of the several times of committing the several trespasses in the declaration mentioned, he, the said Ellis Cunliffe Lister, being so seised, on, &c., by lease and release conveyed to John Smith and his heirs, to the use of him, his heirs and assigns forever, a certain close and plots or parcels of land; that the said Ellis Cunliffe Lister did, in and by the said last-mentioned indenture, grant to the

¹ Contra, *Nudd v. Hobbs*, 17 N. H. 524; *Knowles v. Dow*, 22 N. H. 387. See Gray, *Perp.* §§ 585, 586.

² The opinion only is given.

³ The argument took place on the first of June last, before MAULE, J., CRESSWELL, J., and TALFOURD, J. — REP.

said John Smith and his heirs and assigns, that he and they respectively, being owners and occupiers for the time being of the said close, &c., so released as aforesaid, and all other persons having occasion to resort thereto, should have the right and privilege of passing and re-passing, with or without horses, cattle, carts, and carriages, *for all purposes*, in, over, along, and through a certain road running between the Bradford and Thornton turnpike-road and Legram's Lane, or in, over, and through some other road in the same direction, to be formed by, and at the expense of, the plaintiff, his heirs or assigns, such other road nevertheless passing the southeast corner of the warehouse of the plaintiff, — he the said John Smith, his heirs and assigns, paying to the plaintiff, his heirs and assigns, a proportionate part of the expense of repairing the said road, according to the use thereof by him or them, not exceeding the actual damage done to the road by the wear and tear thereof by the said John Smith, his heirs and assigns. The plea then deduced a title in Samuel Smith to a life-estate in one moiety of the said lands, tenements, hereditaments, and *appurtenances*, and in Thomas Smith to an estate in fee in the other moiety thereof, and alleged possession before and at the times when, &c., and proceeded, — “and the defendants, being so seised and owners as aforesaid, and being in and having such possession and occupation as aforesaid, and having occasion, for their own purposes, to use the right and privilege in that behalf granted and conveyed in and by the indenture of release and grant in this plea first mentioned did, on foot, and with their horses, &c., at the said several times, &c., pass and re-pass, for the purposes of them, the defendants, in, over, and along, and through the road in that plea first mentioned, so being as aforesaid in and upon the said close in which, &c., as they lawfully might.”

The plaintiff craved oyer of the deed, — which was between the plaintiff of the first part, Richard Tolson of the second part, Ellis Cunliffe Lister (to whom the plaintiff had mortgaged the premises) of the third part, Samuel Smith and Thomas Smith of the fourth part, and John Smith of the fifth part, — the plaintiff, as well as Lister, being made a conveying and granting party. [His Lordship read the material parts of the deed.¹] The plaintiff then demurred, assigning for causes,

¹ The substance of this indenture, so far as material to the case, was as follows: It recited that the land conveyed had been settled on Robert Stables Ackroyd, the plaintiff, for life, remainder to Richard Tolson, during the life of the plaintiff, in trust for the plaintiff, remainder to the plaintiff in fee; that the land had been subsequently mortgaged to Ellis Cunliffe Lister; that the plaintiff and Lister had entered into a contract to convey the land to Samuel and Thomas Smith, and that these latter had assigned to John Smith their right to a conveyance. Then the indenture witnessed that the plaintiff, Tolson, and Lister, at the request of Samuel and Thomas Smith, conveyed to John Smith and his heirs certain described parcels of land. “Together with all ways, paths, passages, particularly the right and privilege to and for the owners and occupiers, for the time being, of the said close, pieces, or parcels of land, or any of them, and all persons having occasion to resort thereto, of passing and re-passing, with or without horses, cattle, carts, and carriages, for all purposes, in, over, along, and through a certain road running between the Bradford and

amongst others, that the plea did not show that the trespasses justified were committed in going to or from the premises conveyed, or that they were in any way connected with the enjoyment of those premises.

In support of the demurrer, it was contended, — first, that the road granted was only for purposes connected with the occupation of the land conveyed, and therefore was not sufficient to support the justification pleaded; and, secondly, that, if the grant was more ample, and gave to the grantee a right of using the road for all purposes, although they might not be in any way connected with the enjoyment of the land, it would not pass to an assignee of the land, and therefore the defendants could not claim it under a conveyance of the land, *with the appurtenances*. On the other hand, it was contended that the right created by deed might be assigned *by deed*, together with the land, and was large enough to maintain the justification pleaded.

Upon consideration, we have come to the conclusion that the plaintiff is entitled to our judgment on the demurrer.

If the right conferred by the deed set out, was only to use the road in question for purposes connected with the occupation and enjoyment of the land conveyed, it does not justify the acts confessed by the plea. But, if the grant was more ample, and extended to using the road for purposes unconnected with the enjoyment of the land, — and this, we think, is the true construction of it, — it becomes necessary to decide whether the assignee of the land and appurtenances would be entitled to it. In the case of *Keppell v. Bailey*, 2 Mylne & K. 517, the subject of covenants running with the land was fully considered by Lord Chancellor Brougham; and the leading cases on it are collected in his judgment. He there says (2 Mylne & K. 537): “The covenant (that is, such as will run with the land) must be of such a nature as ‘to inhere in the land,’ to use the language of some cases; or, ‘it must concern the demised premises, and the mode of occupying them,’ as it is laid down in others: ‘it must be *quodammodo* annexed and appurtenant to them,’ as one authority has it; or, as another says, ‘it must both concern the thing demised, and tend to support it, and support the reversioner’s estate.’” Now, the privilege or right in question does not

Thornton turnpike-road and Legram’s Lane, or in, over, and through some other road in the same direction, to be formed by and at the expense of the said Robert Stables Ackroyd, his heirs or assigns, — such other road, nevertheless, passing the southeast corner of the said warehouse of the said Robert Stables Ackroyd; he the said John Smith, his heirs and assigns, paying to the said Robert Stables Ackroyd, his heirs and assigns, a proportionate part of the expense of repairing the said road, according to the use thereof by him or them, not exceeding the actual damage done to the road by the wear and tear thereof by the said John Smith, his heirs and assigns; and the said Robert Stables Ackroyd keeping the said road at all times in good and sufficient repair;” waters, mines, “rights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances” to the parcels, “or any part thereof respectively, belonging, or in any wise appertaining, or with the same, or any of them, or any part thereof respectively, now or at any time heretofore, held and occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof respectively, or appurtenant thereto.” — *Ed.*

inhere in the land, does not concern the premises conveyed, or the mode of occupying them; it is not appurtenant to them. A covenant, therefore, that such a right should be enjoyed, would not run with the land. Upon the same principle, it appears to us that such a right, unconnected with the enjoyment or occupation of the land, cannot be annexed as an incident to it, nor can a way appendant to a house or land be granted away, or made in gross; for no one can have such a way but he who has the land to which it is appendant. Bro. Abr., Grant, pl. 180.¹ If a way be granted in gross, it is personal only, and cannot be assigned. So, common in gross *sans nombre* may be granted, but cannot be granted over (*per* Treby, C. J., in *Weekly v. Wildman*, 1 Ld. Raym. 407). It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it; nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee. "Incidents of a novel kind cannot be devised, and attached to property, at the fancy or caprice of any owner" (*per* Lord Brougham, C., in *Keppell v. Bailey*).

This principle is sufficient to dispose of the present case. It would be a novel incident annexed to land, that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of road over other land. And it seems to us that a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter.

The defendants cannot, therefore, as assigns, avail themselves of the grant to John Smith; and our judgment must be for the plaintiff.

Judgment for the plaintiff.

Tomlinson, in support of the demurrer.

T. F. Ellis, contra.²

¹ Citing 5 H. 7, 7 (M. 5 H. 7, fo. 7, pl. 15): "Note, that it was said by Fairfax (Justice of C. P.) for law, that, if one has a way appendant to his manor, or to his house, by prescription, that way cannot be made in gross; because no man can take profit of that way, except he have the manor or the house to which the way is appendant." — REP.

² See *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Garrison v. Rudd*, 19 Ill. 558.

"There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement." LORD CAIRNS, L. J., in *Rangeley v. Midland Ry. Co.*, L. R. 8 Ch. 306, 312.

GOODRICH v. BURBANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[Reported 12 Allen, 459.]

FOSTER, J. This action of tort is brought to recover damages for the acts of the defendant on his own land, who has cut off a pipe by which water was conducted from a spring thereon, and has contaminated the water which flowed through said pipe to the plaintiff's premises. The lot on which the spring is situated was part of a farm owned by Thomas F. Plunkett, and conveyed to the defendant by Plunkett by a deed dated March 27th, 1850, containing the following clause: "Also reserving to myself, my heirs and assigns, the right of taking so much water forever from the spring situate on the lot last above described, and from which water is now taken in a pipe to supply the grounds of W. H. Tyler, as now runs in said pipe, so long as said pipe lasts, together with the right to replace the same with a pipe of one and one quarter inch inside calibre, and also the right of taking so much water from said spring as will run in said pipe of one and one quarter inch calibre, when thus substituted for the present pipe, together with the right to enter and repair said aqueduct at all times, it being understood that I am to pay such damages as may be from time to time occasioned to the crops and land by said repairs, and said Burbank, his heirs and assigns, is not to molest said Plunkett, his heirs and assigns, in the use of the above reserved rights." At the date of this deed, the pipe was laid as it now is through the defendant's estate, and conducted water to the premises of W. H. Tyler. No part of Plunkett's remaining estate was then or ever had been supplied with water from this aqueduct. It is therefore improbable that the reservation was intended for the exclusive benefit thereof. Plunkett had given to Tyler no right, but the latter had only a revocable license from Plunkett's predecessor to the use of the aqueduct; and there is no reason to suppose that Plunkett intended to annex the reservation to the estate of a stranger, if that were possible. The language used is broad and unqualified. The right is reserved to Plunkett, his heirs and assigns, and not to the assigns of his remaining estate. There is no restriction as to the place where or the purpose for which the water might be used, but only as to the quantity reserved. We are therefore satisfied that Plunkett intended to retain for himself, his heirs and assigns, a right, the enjoyment of which was limited to no particular premises, capable of being used upon any land which he or they might at any time acquire, an assignable and inheritable interest, not annexed to any parcel of land. If the rules of law permit the acquisition of such a right by reservation or grant, we cannot doubt that it has been effectually created in the present instance. And if so, it must inure to the benefit of the present plaintiff, who has derived it by warranty deed from Plunkett through divers means conveyances.

But the defendant insists that such an interest is a predial servitude, in its nature inseparably annexed to some estate, apart from which it cannot be enjoyed; that if regarded as an easement in gross, it is necessarily of a purely personal character, incapable of assignment or inheritance, belonging to Plunkett alone for his personal benefit.

This proposition requires examination. There are *dicta*, perhaps authorities, to the effect that an easement proper, like a way in gross, cannot be created by grant, so as to be assignable or inheritable. Washburn on Easements, 80. *Ackroyd v. Smith*, 10 C. B. 187. However the law may be elsewhere, it would be difficult to establish that doctrine in this Commonwealth, where it has been held that ways in gross "may be granted or may accrue in various forms to one, his heirs and assigns;" *White v. Crawford*, 10 Mass. 188; and that "the law is settled in Massachusetts, by a series of decisions, that a right of way may be as well created by a reservation or exception in the deed of the grantor, reserving or retaining to himself and his heirs a right of way either in gross or as annexed to lands owned by him so as to charge the lands granted with such easement and servitude, as by a deed from the owner of the land to be charged, granting such way either in gross or as appurtenant to other estate of the grantee." *Bowen v. Conner*, 6 Cush. 187.

In the case of rights of *profit à prendre*, it seems to be held uniformly that, if enjoyed in connection with a certain estate, they are regarded as easements appurtenant thereto, but if granted to one in gross they are treated as an estate or interest in land, and may be assignable or inheritable. *Post v. Pearsall*, 22 Wend. 425; Washburn on Easements, 7. The right to take water from a well or spring is held to be an interest in land, although not a *profit à prendre*, and may be claimed by custom. *Race v. Ward*, 4 El. & Bl. 702. And we are aware of no case which denies that the right to an aqueduct may be so created as to exist independently of any particular parcel of land owned by the grantee thereof, and be enjoyed by him and his heirs on any estate which he or they may own or acquire, and be capable of assignment or conveyance in gross. The water itself may not be the subject of property, but the right to take it and to have pipes laid in the soil of another for that purpose, and to enter upon the land of another to lay, repair and renew such pipes, is an interest in the realty, assignable, descendible and devisable. On this subject the language of Judge Curtis is as follows: "I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water from it by pipes, to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house, or not, as I please. It is true the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house. But these may be acquired afterwards. Incor-

poreal rights may be inseparably annexed to a particular message or tract of land, by the grant which creates them, and makes them incapable of separate existence. But they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a message or land, and again severed therefrom by a conveyance of the message or land, without the right, or a conveyance of the right without the land." *Lonsdale Co. v. Moies*, 21 Law Rep. 664.

We have many cases in our own reports which recognize the right to take a certain quantity of water from a mill pond as a distinct and substantive subject of grant, without restriction as to its use at any designated place. Rights of water duly granted by deed, not appurtenant to any particular parcel of land, may be used by the owner at any place or in any manner, so long as he does not interfere with or impair the rights of others. *De Witt v. Harvey*, 4 Gray, 486. We are unable to distinguish between the right to take water by a canal from a pond for the purposes of power, and the right to take it from a spring in a pipe for domestic purposes, the watering of cattle, to supply an artificial jet or fountain, and to sell it to others for any uses they may desire to make of it.

In the present case it does not appear that the change in the direction or location of the pipe after it leaves the land of the defendant has increased the quantity of water taken from the spring. We are therefore of opinion that this action can be maintained; and, the judge who presided at the trial in the Superior Court having ruled otherwise, the exceptions are sustained.

W. H. Swift, (*M. Wilcox* with him), for the plaintiff.

H. L. Dawes (*E. M. Wood* with him), for the defendant.¹

¹ And so *Hall v. Ionia*, 88 Mich. 493; *Mayor of New York v. Law*, 125 N. Y. 380; *Pinkum v. Eau Claire*, 81 Wis. 301.

"Such an easement [a way] is never presumed to be personal, when it can fairly be construed to be appurtenant to some other estate. When there is, in the deed, no declaration of the intention of the parties in regard to the nature of the way, it will be determined by its relation to other estates of the grantor, or its want of such relations. The *terminus ad quem* is of especial significance." *Wells, J.*, in *Dennis v. Wilson*, 107 Mass. 591, 592. Cf. *Louisville & N. R. R. Co. v. Koelle*, 104 Ill. 455.

"There is always a dominant and a servient tenement. It is not necessary that they should be contiguous to each other. The proximity of the one to the other is of little comparative importance in determining the question whether the easement passes by a conveyance of the dominant tenement. It depends rather upon the nature, character and purpose of the easement, its relation to the subject matter of the grant, its accustomed use in connection with it, and its necessity to the value, and to the beneficial and convenient use of the premises granted." *Perrin v. Garfield*, 87 Vt. 804, 812. And see *Cady v. Springfield Water Works Co.*, 134 N. Y. 118. But cf. *Whaley v. Stevens*, 21 S. C. 221; *Fisher v. Fair*, 34 S. C. 203.

On the effect of a grant in fee of an easement to one who has only a limited interest in the dominant tenement, see *Rymer v. McLeroy*, [1897] 1 Ch. 528; and see *Amidon v. Harris*, 118 Mass. 60.

The right to use a fence for advertising purposes is an easement in gross, which binds subsequent grantees of the fence with notice. *Willoughby v. Lawrence*, 116 Ill. 11.

BOATMAN v. LASLEY.

SUPREME COURT OF OHIO. 1873.

[Reported 23 Ohio St. 614.]

MOTION for leave to file a petition in error to the District Court of Gallia County.

The original action was brought in the Court of Common Pleas of Gallia County by Matthew Lasley against Isaac Boatman and wife, to foreclose a mortgage executed by the defendants to secure the payment of purchase-money of the lands mortgaged. The mortgaged premises had been conveyed by the plaintiff to defendant, Isaac Boatman, on the 15th of March, 1870, by a deed containing a covenant that the demised premises were free and clear of all incumbrances. The defendant answered, and by way of counter-claim, alleged damages resulting from a breach of this covenant against incumbrances. The alleged incumbrance consisted of a private right of way over the warranted premises, outstanding at the date of the conveyance in one Alexander Logue. This right of way had been granted by deed, on the 7th day of June, 1862, by the warrantor, to "Logue, his heirs and assigns, and the tenants or occupiers for the time being of the lands now (then) owned and occupied by the said Alexander Logue, in section 15, town 5, of range 14, in the Ohio Company's Purchase." It is also alleged in the answer, that, before the 15th of March, 1870 (the date of the covenant), said Logue had conveyed his lands in section 15, town 5, of range 14, in the Ohio Company's Purchase, to one George W. Roush. It is not alleged, however, that Logue, at the time the right of way over the warranted premises was granted to him by the plaintiff, was the owner or occupier of any land in said section 15, or elsewhere, nor is it alleged that the right of way complained of became appendant or appurtenant to any land whatever, or that said Roush had any interest in said right of way.

The plaintiff, in his reply, denied that Roush had an easement or right of way on the premises granted to the defendant, and also denied that the defendant had sustained any damage by reason of the right of way complained of.

The cause was submitted to a jury, who assessed the defendant's damages, by reason of the existence of the right of way, at \$100, which sum was deducted from the mortgage debt, and decree entered in favor of the plaintiff for the balance.

During the trial the defendant took a bill of exceptions, from which it appears that the defendants offered in evidence the deed for the right of way from Lasley to Logue, a copy of which is attached, marked "A." They also gave evidence tending to prove that said right of way was still in the occupation of said Alexander Logue, and those claim-

ing under him, who were then occupying the lands to which said right of way was intended to be made appendant. "And the plaintiff, to maintain the issue on his part, gave evidence tending to show that at the time said deed of right of way was executed by him to Alexander Logue, the said Logue did not own the land to which the right of way was intended to be appendant, and that said Logue had, prior to the execution of the deed of right of way, conveyed said lands to one George W. Roush."

The evidence being closed, the court charged the jury as follows: "If the jury shall find from the evidence that at the date of the deed made by Lasley to Logue, marked 'A,' the said Alexander Logue, grantee therein, was not the owner in fee or otherwise of some real estate adjoining the farm through which said right of way is granted, or situate in the neighborhood, so that said right of way may become appurtenant to the same, then the said deed conveys a right of way personal to himself alone, — one which cannot descend to his heirs, and one which he cannot assign or release to another person, except such other person be the owner of the farm through which said way was granted."

The judgment of the Common Pleas was afterward, on petition in error, affirmed by the District Court of Gallia County.

Leave is now asked to file a petition in error in this court to reverse the judgment below, for alleged error in the charge to the jury as above set forth.

Joseph Bradbury, for the motion.

W. H. Lasley, contra.

MCLVAIN, J. Is a private right of way over the lands of another, in gross, such an interest or estate in land, as may be cast by descent, or may be assigned by the grantee to one who has no interest in the land? These are the only questions in this case. If such a right be inheritable or assignable, the Court of Common Pleas erred in its charge; otherwise there is no error in the record.

The terms of the deed from Lasley to Logue plainly import an intention to make the right of way therein granted appendant and appurtenant to other lands, but the record does not disclose either the facts or the law given to the jury, whereby it could determine whether or not that intention was accomplished. It simply shows that the jury was instructed that if the right of way granted did not and could not, under the circumstances, become appurtenant to lands other than those over which it was granted, then it was a mere personal right in the grantee, which could not be inherited from him, or transferred by him to a stranger.

The correctness of this instruction does not depend upon a construction of the deed by which it was granted, for the terms of the grant are "to Alexander Logue, his heirs and assigns." The real question is, whether or not a private right of way in gross is, in law, capable of being transferred or transmitted.

It is strongly insisted upon, in argument, that a right of way in gross may be conveyed to the grantee "and to his heirs and assigns forever," because an owner in fee may carve out of his estate any interest less than the whole and dispose of the less estate absolutely; and this because the power to dispose of the whole estate includes a power to dispose of any part of it.

This argument assumes the affirmative of the very question in controversy, to wit, that such a right of way is *an interest or estate in the land*.

A mere naked right to pass and repass over the land of another, a use which excludes all participation in the profits of the land, is not, in any proper sense, an interest or estate in the land itself. Such a right is in its nature personal; it attaches itself to the person of him to whom it is granted, and must die with the person.

If such right be an inheritable estate, how will the heirs take? In severalty, in joint tenancy, coparcenary, or as tenants in common? If not in severalty, how can their interests be severed?

If it be assignable, what limit can be placed on the power of alienation? To whom and to how many may it be transferred? Why not to the public at large, and thus convert into a public way that which was intended to be a private and exclusive way only?

Where the way is appendant or appurtenant to other lands, very different considerations arise. There the right attaches to the lands to which the way is appurtenant, because it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case the right of way passes with the dominant estate as an incident thereto. A right of way appendant cannot be converted into a way in gross, nor can a way in gross be turned into a way appendant.

A very marked distinction also exists between a way in gross and an easement of *profit à prendre*; such as the right to enter upon the lands of another, and remove gravel or other materials therefrom. The latter so far partakes of the nature of an estate in the land itself, as to be treated as an inheritable and assignable interest. *Post v. Pearsall*, 22 Wend. 432.

Both upon principle and authority, we think there was no error in the charge of the court below. Mr. Washburn, in his work on Easements, page 8, par. 11, states the law upon this subject as follows: "A man may have a way in gross over another's land, but it must, from its nature, be a personal right not assignable or inheritable; nor can it be made so by any terms in the grant, any more than a collateral and independent contract can be made to run with the land." See also *Ackroyd v. Smith*, 10 C. B. 164; *Garrison v. Rudd*, 19 Ill. 558; *Post v. Pearsall*, 22 Wend. 432; Woolrych on Ways, 20; 2 Black. Com. 35; 3 Kent's Com. 420, 512.

*Leave refused.*¹

¹ See *Cadwalader v. Bailey*, 17 R. I. 495; *Blood v. Millard*, 172 Mass. 65.

SECTION III.

NATURE AND EXTENT OF EASEMENTS.

NOTE. — Speaking generally, one estate of fee simple in a corporeal hereditament is like any other estate of fee simple in a corporeal hereditament, but the number of different easements which may be appurtenant to land is indefinite; that is, the nature of an easement is dependent upon the circumstances attending its creation. It is not easy to determine what matters belong properly under this section as concerning the nature and extent of easements, and what in the following book as touching the creation of interests. The line of distinction which has been followed is this: Cases in which the existence of an easement was admitted, but in which its nature or extent only was in question, have been placed here; while cases in which the existence of any easement at all was disputed have been postponed to the following book.

A. *Nature of Easements.*

HILL v. TUPPER. ✓

EXCHEQUER. 1868.

[Reported 2 H. & C. 121.]

DECLARATION. — For that, before and at the time of the committing by the defendant of the grievances hereinafter mentioned, the plaintiff was entitled to, and had and was possessed of, the sole and exclusive right or liberty to put or use boats on a certain canal, called the Basingstoke Canal, for the purposes of pleasure and to let the same boats for hire on the said canal for the purposes of pleasure. Yet the plaintiff says that, whilst he was so entitled and possessed as aforesaid, the defendant, well knowing the premises, wrongfully and unjustly disturbed the plaintiff in the possession, use, and enjoyment of his said right or liberty, by wrongfully and unjustly putting and using, and causing to be put and used, divers boats on the said canal for the purposes of pleasure, and by letting boats on the said canal for hire, and otherwise for the purposes of pleasure. By means of which said premises the plaintiff was not only greatly disturbed in the use, enjoyment, and possession of his said right and liberty, but has also lost great gains and profits which he ought and otherwise would have acquired from the sole and exclusive possession, use, and enjoyment of his said right or liberty, and was otherwise greatly aggrieved and prejudiced.

Pleas. — First: Not guilty; secondly: that the plaintiff was not entitled to, nor had he, nor was he possessed of, the sole and exclusive right or liberty to put or use boats on the said canal for the purposes of pleasure, nor to let the said boats for hire on the said canal for the purposes of pleasure as alleged. — Issues thereon.

At the trial, before *Bramwell*, B., at the London Sittings, after last Hilary Term, the following facts appeared : Under the 18 Geo. 3, c. 75, the Company of Proprietors of the Basingstoke Canal Navigation were incorporated with perpetual succession and a common seal, for the purpose of making and maintaining a navigable canal from the town of Basingstoke, in the county of Southampton, to communicate with the River Wey in the parish of Chertsey, in the county of Surrey. The lands purchased by the Company of Proprietors, under their parliamentary powers, were by the Act vested in the company.

By the 100th section of the Act it is enacted : "That it shall and may be lawful for the owners and occupiers of any lands or grounds adjoining to the said canal, *to use upon the said canal any pleasure boat or boats*, or any other boat or boats, for the purpose of husbandry only, or for conveying cattle from one farm, or part of a farm or lands to any other farm or lands of the same owner or occupier, without interruption from the said Company of Proprietors, their successors or assigns, agent or agents, and without paying any rate or duty for the same; and *so as such boat or boats be not above seven feet in breadth*, and do not pass through any lock to be made on the said navigation, without the consent of the said Company of Proprietors, their successors or assigns, *or be employed for carrying any goods, wares, or merchandise to market or for sale, or any person or persons for hire*; and so as the same shall not obstruct or prejudice the said navigation, or the towing-paths, or obstruct any boats passing upon the said navigation liable to pay the rates or duties aforesaid; and the owner of all such pleasure boats or other boats shall, in his own lands or grounds, make convenient places for such boats to lie in, and shall not suffer them to be moored or remain upon the said canal."

The defendant was the landlord of an inn at Aldershot adjoining the canal, and his premises abutted on the canal bank. The plaintiff, who was a boat proprietor, also occupied premises at Aldershot on the bank of the canal, which he held under a demise from the Company of Proprietors, and by virtue of the demise claimed the exclusive right of letting out pleasure boats for hire upon the canal, which was the right the defendant was alleged to have disturbed.

The lease under which the plaintiff claimed this right was dated the 29th of December, 1860, and by it, in consideration of the rents, covenants, and agreements therein contained, the said Company of Proprietors demised to the plaintiff, under their common seal, for the term of seven years from the 24th of June, 1860, at the yearly rent of £25, "All that piece or parcel of land containing nineteen poles or thereabouts, adjoining Aldershot wharf, situate in the parish of Aldershot aforesaid, and the wooden cottage or tenement, boat-house, and all other erections now or hereafter being or standing thereon, &c." (describing the premises by boundaries, and by reference to a plan), "together with the appurtenances to the same premises belonging. And also the sole and exclusive right or liberty to put or use boats on

the said canal, and let the same for hire for the purposes of pleasure only." The lease contained various covenants framed with the object of preventing any interference by the plaintiff's pleasure boats with the navigation of the canal, and a proviso for re-entry for any breach of the covenants.

The evidence of the defendant was at variance with that adduced on behalf of the plaintiff upon the question whether the defendant had ever let out boats upon the canal for hire, in the sense of a direct money payment. The defendant did not deny that he kept pleasure boats, and used them upon the canal, but stated that he kept them for the use of his family; he admitted, however, that gentlemen had come from time to time to his inn and used these boats for fishing and bathing.

The learned judge reserved leave to move to enter a nonsuit or verdict for the defendant, and left to the jury the question whether the defendant had obtained any pecuniary advantage from the boats. The jury found a verdict for the plaintiff; damages, a farthing.

Hance, on a former day in this term, obtained a rule *nisi* to enter a nonsuit or verdict for the defendant on the ground, first, that the Company of Proprietors of the Basingstoke Canal Navigation had no power to grant the exclusive right claimed; secondly, that, if the grant were good, the action would not lie by the plaintiff against the defendant for the alleged infringement of the right: or for a new trial on the ground of misdirection by the judge in directing the jury that the defendant was liable if he obtained any pecuniary advantage from the boats.

Garth and *Holl* showed cause.

Bernard (with whom was *Montagu Chambers* and *Hance*), appeared in support of the rule, but was not called upon to argue.

POLLOCK, C. B. We are all of opinion that the rule must be absolute to enter the verdict for the defendant on the second plea. After the very full argument which has taken place, I do not think it necessary to assign any other reason for our decision, than that the case of *Ackroyd v. Smith*, 10 C. B. 164, expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee. This grant merely operates as a license or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right. It is argued that, as the owner of an estate may grant a right to cut turves, or to fish or hunt, there is no reason why he may not grant such a right as that now claimed by the plaintiff. The answer is, that the law will not allow it. So the law will not permit the owner of an estate to grant it alternately to his heirs male and heirs female. A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property; but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by Act of Parliament. A grantor may bind himself by covenant to allow any right

he pleases over his property, but he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for any infringement of such a limited right as that now claimed.

MARTIN, B. I am of the same opinion. This grant is perfectly valid as between the plaintiff and the Canal Company; but in order to support this action, the plaintiff must establish that such an estate or interest vested in him that the act of the defendant amounted to an eviction. None of the cases cited are at all analogous to this, and some authority must be produced before we can hold that such a right can be created. To admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates. The only consequence is that, as between the plaintiff and the Canal Company, he has a perfect right to enjoy the advantage of the covenant or contract; and, if he has been disturbed in the enjoyment of it, he must obtain the permission of the Canal Company to sue in their name. The judgment of the Court of Common Pleas in *Ackroyd v. Smith*, 10 C. B. 164, and of Lord Brougham, C., in *Keppell v. Bailey*, 2 Myl. & K. 517, 535, are, in the absence of any case to the contrary, ample authority for our present decision.

BRAMWELL, B. I am of the same opinion. I will only add, that the defendant cannot have the verdict entered for him on the plea of not guilty, for no leave was reversed at the trial; and the defendant could only succeed on that issue by obtaining a new trial on the ground of misdirection. The rule must therefore be absolute to enter the verdict for the defendant on the second plea, unless the plaintiff elects to be nonsuited; but as he can never make a better case, the better course would be to enter the verdict for the defendant on the second plea.

*Rule absolute accordingly.*¹

¹ See *Nuttall v. Bracewell*, L. R. 2 Exch. 1, 12.

An owner of an estate for years may create a right analogous to an easement, in favor of another estate even for years. *Newhoff v. Mayo*, 48 N. J. Eq. 619.

That an easement may be appendant to an easement, if there is no incongruity in the union, e. g. a way to a several fishery, see *Hanbury v. Jenkins*, [1901] 2 Ch. 401, 421.

B. *Extent of Easements.*

a. SUPPORT AND PARTY WALLS.

NOTE.— See Chap. II. sect. 1, *ante*.

MATTs v. HAWKINS.

COMMON PLEAS. 1813.

[*Reported 5 Taunt. 20.*]

THE plaintiff declared in trespass, for that the defendant broke and entered his close in St. Giles's in the Fields, and pulled down and destroyed a certain part of a certain wall of the plaintiff's which he was erecting on the said piece of ground, and prevented his building the same, whereby he was prevented from enjoying the land so beneficially as he might have done, and was put to expense in endeavoring to rebuild it. There was another count for breaking a wall of the plaintiffs, and taking away the materials, and other counts for pulling it down a second time, when the plaintiff had rebuilt it. The defendant pleaded the general issue. Upon the trial of this cause, at the Westminster sittings after Michaelmas Term, 1812, before *Mansfield, C. J.*, it appeared that the defendant was the owner of a piece of waste ground in Charles Street, Drury Lane, whereon formerly stood a public house called the Bull's Head, which had been pulled down about ten years since, and the plaintiff was the owner of a workshop, which stood on ground on the west side of the defendant's ground, and next adjoining thereto, and abutting thereon. The eastern wall of the plaintiff's premises had therefore been the western boundary of the defendant's house, the Bull's Head, before it was pulled down, and the defendant had since built a shed against it on his side. The plaintiff had, without any communication with the defendant, begun to raise this wall higher than it had formerly been, for the purpose of adding to the buildings on his side, when the defendant thought proper to pull it down to its former height. The witnesses proved that the wall was a proper party fence-wall between the two buildings, and had been built about twenty-five years before at the joint expense of both proprietors, and that it stood on the boundary line, so that part of the wall was on the ground of each proprietor. The defendant contended, that as no notice had been given to him under the Building Act, 14 G. 3, c. 78, as required by § 38, of its being out of repair, and of the plaintiff's intention to repair or rebuild it, he had no right to add to it or meddle with it; and also that the defendant was tenant in common with the plaintiff of the wall,

and therefore no action of trespass could be supported by the plaintiff against his companion for pulling down the common property. The jury found a verdict for the plaintiff, with 40s. damages, *Mansfield*, C. J., reserving this point; upon which

Best, Serjt., in Hilary Term, 1813, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, when GIBBS, J., observed that the title he contended for, would not avail the defendant; he must contend he was joint-tenant, if he hoped to succeed in the argument.

Shepherd, Serjt., showed cause.

Best, contra.

MANSFIELD, C. J. If these parties are tenants in common, no trespass lies; but I see not how they became tenants in common. Under the circumstances, each has a right to the use of this wall; but the wall stands, part on the ground of each, and therefore is not the property of them as tenants in common; and each party, for any injury done to the part which stands on his own land, must have the ordinary remedy.

HEATH, J. I am of the same opinion. It is truly said for the defendant, that the building ensues the nature of the tenure of the land; there must be a conveyance to pass the property of the soil; it will not pass by parol agreement. Here is no tenancy in common. Lord Mansfield said, if a man lets another build on his land, it shall be pronounced a gift; but he never went further than that. [GIBBS, J., seemed to doubt if that doctrine could be supported.]

CHAMBRE, J. At common law, no action of waste lay by one tenant against another; that action was given by the Statute of Westminster the second. The same reasons that prevented a tenant in common from maintaining waste at common law, equally hinder him from maintaining trespass; the question then is, whether these persons are tenants in common. Now the Statute which gives each party certain rights in a wall built in this way, does not make it a common property; it only confers on each a right to use it for certain purposes. There is no transfer of property here, and the parties are several owners of their respective land as before.

GIBBS, J. I am of the same opinion. Trespass lies not by one tenant in common against another tenant in common. The only remaining question is, whether these parties are tenants in common. How are they such? One is owner of the land on which one half of the wall is erected, and the other is owner of the land on which the other half of the wall is erected at their joint expense; and under the Building Act, each is entitled to certain easements in the wall on the land of the other. If they are tenants in common, either may sue out a writ of partition against the other, and then, after partition made, they revert to their own rights again. For this reason, as well as for others, I am clearly of opinion that this rule cannot be maintained.

Rule discharged.

CUBITT v. PORTER.

KING'S BENCH. 1828.

[Reported 8 B. & C. 257.]

DECLARATION stated that the defendant on, &c., at, &c., broke and entered a certain close of the plaintiff, to wit, in the city of Norwich, and county of the same city, and then and there pulled down and damaged a great part of a certain wall of the plaintiff, then standing and being in and upon the said close, and the materials thereof, of the plaintiff, of the value of £100, seised, and carried away, and converted, and disposed thereof to his, the defendant's, own use; and also erected and built a certain other wall, and a certain privy, and a certain other erection and building against and upon the wall of the plaintiff, and kept and continued the same other wall, &c., upon and against the wall of the plaintiff for a long space of time, and also cast divers quantities of bricks and rubbish upon the plaintiff's close, by means of which several premises the wall of the plaintiff had been and was greatly weakened and injured, &c. Plea, Not guilty. At the trial before *Alexander*, C. B., at the Summer Assizes for the county of Norfolk, 1826, it appeared that the plaintiff was the occupier of a cottage and garden, as tenant to one Mr. Doman. They had formerly been the property of the plaintiff's father. The defendant was the owner of premises adjoining those occupied by the plaintiff, and separated therefrom by a wall, part of which the defendant, in July, 1825, had pulled down, and erected on the site of it another wall (of a greater height than the old wall), with a cottage and other buildings against it, and the present action was brought, after the new wall had been rebuilt, to try the right of property in that wall. There was evidence on both sides of various acts of user of the wall by the respective owners of the plaintiff's and defendant's premises. The Lord Chief Baron, upon this evidence, told the jury to find for the defendant, if they thought the wall was his, or if, from the common user of the wall by the respective owners of the plaintiff's and defendant's premises, they believed the plaintiff and defendant had a common property in it. The verdict returned by the foreman of the jury was: "We find this to be a party wall." The Lord Chief Baron said, That is a verdict for the defendant. After the jury had separated, the plaintiff's counsel observed, that the wall might be a party wall, and yet the plaintiff and defendant might not be tenants in common of it, or of the land on which it was built; for if each of the proprietors of the two estates contributed the site of the land on which it was built in equal moieties, or had contributed in the same proportion to the expense of building it, each of them would remain the owner of a moiety of the wall, and might maintain an action against the other for any injury done to that moiety. *Storks*, Serjt., in

Michaelmas Term, 1826, obtained a rule nisi for a new trial, upon the ground, first, that the attention of the jury had not been drawn to that distinction, and that it might, therefore, be true that the wall was a party wall, and yet this action would be maintainable. Secondly, assuming that the verdict established that they were tenants in common of the wall, and of the land on which it was built, still the action was maintainable, because there had been a destruction of the subject-matter of the tenancy in common by one of the two co-tenants.

Robinson and Wallinger now showed cause.

Storks, Serjt., and F. Kelly, contra.

BAILEY, J. I am of opinion that the rule for a new trial ought to be discharged. This was an action for pulling down the plaintiff's wall. If the wall was the exclusive property of the plaintiff, then the act done by the defendant was a sufficient ground for the action. If it was entirely the property of the defendant, then he was justified in doing what he did. There was a third view of the case, and that was the view taken of it by the Lord Chief Baron at the trial, viz., that it might be the common property of the plaintiff and defendant. The question left to the jury was, Whether from the common use of the wall they would not infer that it was common property? Now there was certainly very strong evidence of common use, and the nature of the right may be collected from the manner in which a thing has been used. The jury found that it was a party wall; they did not in terms find that it was common property; but on having the question whether it was common property put to them, they found it was a party wall. The Lord Chief Baron observed, this was a verdict for the defendant. Until the jury had separated, no observation was made upon the subject of the direction of the judge, or upon the answer of the jury on that point. And I think it is too late, on a motion for a new trial, to suggest that the case might have been differently presented to the consideration of the jury; and that if that had been done, the verdict might have been different. The probability is against the existence of that state of things which would have justified a verdict for the plaintiff, even on that view of the case, which was not presented to the consideration of the jury. Where a wall is common property, it may happen either that a moiety of the land on which it is built may be one man's, and the other moiety another's, or the land may belong to the two persons in undivided moieties. It does not appear whether at the time when this wall was built the land belonged wholly to one individual. It might at that time have belonged entirely to one, and then he might have sold off a part; or he might have sold an undivided moiety of the wall with the land on one side, and an undivided moiety of the wall with the land on the other side. If the land on which the wall was built belonged on one side to one party, and on the other to the other party, and they between them agreed to build the wall, it would have been prudent at least to make this bargain, that so long as there was to be a wall continuing on this property, the land on which it was built,

and the wall which stood upon that land, should be taken and considered to be the common property of the two, and that the owners of the estates on each side should be tenants in common of the undivided moiety of that land and of that wall; with the power of adopting such remedies for partition as tenants in common may adopt. On the other hand, if the wall stood partly on one man's land, and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two. It seems to me, the probability of the case is, that this was not a party wall according to the principle which was acted upon in the case of *Matts v. Hawkins*, 5 Taunt. 20, but that it was a wall built on the common property of the two, and that the wall was the common property of both. *Matts v. Hawkins* naturally led to a different conclusion; for under the Party Wall Act, each is to contribute the land for that which is to be built on the common soil of the two. If the land is to be contributed by the parties in equal proportions, it may be a probable consequence (I do not say whether it is or not) that the wall belongs one half to the one, and the other half to the other; but that, as it seems to me, in the country where the Party Wall Act does not apply, is such an improbable state of things that we ought not to send it down again to a new trial on the ground that that view of the case was not presented to the consideration of the jury, when at the trial it was not desired by the counsel that it should be so presented to them.

Then, the next point is, whether, assuming that the land on which this wall was built, and that the wall itself, was the common property of the two, the act done by the defendant entitled the plaintiff to maintain trespass. It has been contended that trespass is maintainable, on the ground that there was a destruction of the thing, and that if one tenant in common destroy that which is the subject of the tenancy in common, that is an actual ouster and expulsion by the one of the other, and that the party so expelled may maintain an action of trespass for what has been done in that respect. Perhaps if one had entirely destroyed the wall, that might have been a foundation for an action of trespass. But I take it, that in the case of a wall, a temporary removal, with a view to improve part of the property on one side at least, and, perhaps, on both, is not such a destruction as will justify an action of trespass. There is no authority to show that one tenant in common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy in common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction; the object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made. But then it is said the wall here is much higher than the wall was before. What is the consequence of that? One tenant in common has, upon that which is the subject-matter of the tenancy in common, laid bricks and heightened the wall. If that be

done further than it ought to have been done, what is the remedy of the other party? He may remove it. That is the only remedy he can have. If there be land belonging to two as tenants in common, and one builds a wall on that land, the other cannot bring trespass, because he is excluded from the surface of that ground for a certain period of time, viz., for so long a period as that wall stands. This case falls within the principle acted upon in *Wiltshire v. Sidford*, 8 B. & C. 259 n. The view in which it was presented to the jury by the Lord Chief Baron was the right view of it. There was evidence of a common user by both parties, which justified the presumption either that the wall was originally built, on land belonging in undivided moieties to the owners of the respective premises, and at their joint expense; or that it had been agreed between them that the wall and the land on which it stood should be considered the property of both as tenants in common, so as to insure to each a continuance of the use of the wall. For these reasons I am of opinion that this rule ought to be discharged.

HOLROYD, J. I am of opinion that this rule ought to be discharged. It is incumbent on the plaintiff to establish his right of action. The declaration in this case was for pulling down the old wall and building the new one. The presumption arising from the acts of enjoyment is, that the wall was the property of the plaintiff and defendant as tenants in common; for the law will presume that what was done without opposition for a considerable time was done rightfully, and that these acts of enjoyment were lawful. That being the case, there was abundant evidence upon the trial to raise a question to go to the jury, whether the wall was or was not the common wall of both. There having been a joint use of the wall by both, each must have had the right originally, or have acquired the right in the course of time by legal means. The jury have found in effect that it was their common property. The question then arises, whether one tenant in common can maintain an action of trespass against another for such acts as were done in this case by pulling down the old wall and building the new one on its site. Taking it to be the law, that where there is a complete destruction by one tenant in common of that which he has in common with others, so that that other is wholly deprived of the use of it, an action of trespass will lie, I think the act done by the defendant in this case cannot be considered as a destruction of the wall; the removal of the old wall having been effected merely for the purpose of rebuilding another on its site as speedily as possible.¹

*Rule discharged.*²

¹ See *Wiltshire v. Sidford*, 1 Man. & Ry. 404, 403, note. In *Mayfair Property Co. v. Johnston*, (1894) 1 Ch. 506, NORTH, J., decreed partition of a party-wall at the petition of one tenant in common, and said (p. 515): "The parties are to become owners of separate parts of it [the wall], and each of them will have absolute control over that which will then be his own land. Each of them can deal with his own land as he pleases."

² The opinion of LITTLEDALE, J., is omitted.

WATSON v. GRAY.

CHANCERY DIVISION. 1880.

[Reported 14 Ch. D. 192.]

THIS action was brought to restrain the commission of certain alleged acts of trespass by the defendant, and for damages.

The plaintiff and the defendant were the owners in fee of adjoining houses, numbered respectively 9 and 7 in a row of houses called Queen's Terrace, in Middlesborough. Queen's Terrace faced to the east, and the defendant's house was situate to the north of the plaintiff's. At the rear of each of the houses was a yard, the yards being separated from each other by a wall four and a half inches thick.

The plaintiff's house and premises were by a deed dated the 15th of September, 1855, conveyed by Joseph Pease and others in fee to Jane Lyons, who was a predecessor in title of the plaintiff. The deed contained the following clause: "It is hereby agreed and declared by and between the said parties hereto that the north and south gables and walls of the said messuage or dwelling-house and hereditaments hereby conveyed shall be and remain party walls, and that the eastern and western walls and the pallsades in front of the said messuage or dwelling-house shall belong exclusively to the said Jane Lyons, her heirs and assigns."

The defendant's house and premises were conveyed to him in fee by the same persons by a deed dated the 27th of December, 1864, which contained a similar declaration as to the north and south walls thereof.

The principal act of trespass complained of by the plaintiff arose in this way. The plaintiff had recently commenced erecting in his back yard a shed. This shed immediately adjoined the wall separating his yard from the defendant's yard, and the plaintiff had, without the defendant's permission, built on the top of that wall a new piece of wall of a triangular shape about 4 ft. 6 in. in length at the bottom, and about 3 ft. 4 in. in height. In thickness it corresponded with the thickness of the old wall. The new piece of wall was intended to support the roof of the shed. The defendant had knocked down the new piece of the wall. The plaintiff claimed damages for the removal of the new piece of wall, and an injunction to restrain the defendant from interfering with the rebuilding of it.

North, Q. C., and Everitt, for the plaintiff.

J. E. Palmer, for the defendant.

Fry, J., after stating the facts, and observing that the conveyance to the plaintiff would, no doubt, include the walls of the house, if it had not contained the proviso that the north and south walls should be party walls, stated that proviso, and continued:—

What is the meaning of the term "party wall," as there used? The

words appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses.

They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford*, 1 Man. & Ry. 404, and *Cubitt v. Porter*, 8 B. & C. 257, 265. I think that the judgments in those cases show that that is the most common and the primary meaning of the term. In the next place, the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring owners, as in *Matts v. Hawkins*, 5 Taunt. 20. Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the Building Acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favor of the owner of the other moiety.

In whichever of these senses the term is used, some difficulty arises. In the case of a longitudinal division between the two neighbors, each of them, as was said in *Cubitt v. Porter*, 8 B. & C. 257, 264, has a right to pare away one moiety of the wall; and if this was done, the moiety of the other owner might be of very little use to him. Again, if the wall belongs to the adjoining owners as tenants in common, it may become the subject of a partition, and then exactly the same difficulty would arise. To meet this difficulty the fourth meaning of the term "party wall" was suggested by the learned author of the note to *Wiltshire v. Sidford*, 1 Man. & Ry. 408.

In the present case I have come to the conclusion that the wall must be considered as belonging to the plaintiff and the defendant as tenants in common, first, because the cases show that this is the most ordinary meaning of the words, and, secondly, because in the conveyance of the 15th of September, 1855, a party wall is contrasted with a wall belonging exclusively to one owner.

Then the question arises whether what the plaintiff has done is a violation of the defendant's rights. This, it must be remembered, is not the same question as whether an action of trespass could be maintained by the defendant against the plaintiff. I have come to the conclusion that the plaintiff was not justified in doing what he did. In *Cubitt v. Porter*, 8 B. & C. 265, Bailey, J., said: "One tenant in common has upon that which is the subject-matter of the tenancy in common laid bricks and heightened the wall. If that be done further than it ought to have been done, what is the remedy of the other party? He may remove it. That is the only remedy he can have." That is the precise remedy to which the defendant has had recourse in the present case. The case of *Stedman v. Smith*, 8 E. & B. 1, is also material on this part of the present case. There, as the head-note states, "the plaintiff and the defendant occupied adjacent plots of ground divided by a wall of which they were tenants in common. There was a shed on the defendant's ground contiguous to the wall, the roof of which

rested on the top of the wall across its whole width. The defendant took the coping-stones off the top of the wall, heightened the wall, replaced the coping-stones on the top, and built a wash-house contiguous to the wall, where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall, and he set a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him." On these facts it was held that a jury might find an actual ouster by the defendant of the plaintiff from the possession of the wall which would constitute an actionable trespass. In the course of the argument, Crompton, J., said: "You certainly had no longer the use of the same wall; you could not put flower-pots on it, for instance. Suppose he had covered it with broken glass, so as to prevent your passing along it, as you were entitled to do." And in his judgment he said: "The plaintiff is excluded from the top of the wall; he might have wished to train fruit-trees there, or to amuse himself by running along the top of the wall." Just so in the present case, the plaintiff has excluded the defendant from the use of the top of the wall. I hold, therefore, the plaintiff is not entitled to any damages in respect of the throwing down of the wall, and that the injunction asked for cannot be granted.¹

SHERRED v. CISCO.

SUPERIOR COURT OF NEW YORK. 1851.

[Reported 4 Sandf. S. C. 480.]

THIS was a bill in equity, filed in the Supreme Court, from whence the cause was transferred to this court. An answer was put in, a replication filed, and evidence was introduced at the hearing of the cause. The facts disclosed by the pleadings and proofs were as follows.

For several years prior to 1845, the complainant, Sarah Sherred, was seised in fee of a lot known as number thirty-one, on the easterly side of Broad Street, in the city of New York; and Richard Duryee in his lifetime, and after his death his heirs, were seised in fee of the adjoining lot on the north side, known as number twenty-nine. Each lot was covered by a store or warehouse. The buildings were separated by a single brick wall, resting on a stone foundation, one half of which was upon the land of Sherred, and the other half on the land of Duryee. The beams of the two stores rested upon this common or party wall. Duryee had executed several mortgages on lot number twenty-nine, which were duly recorded. Prior to July 19th, 1845, Duryee died, and the mortgagees to whom three of the mortgages were executed, commenced proceedings for their foreclosure against Duryee's heirs and

¹ On the acquisition of party-wall rights by prescription, see *Waddington v. Naylor*, 60 L. T. R. 480; *Barry v. Edlavitch*, 84 Md. 96; *McVey v. Durkin*, 136 Pa. 418.

the subsequent mortgagees. While the foreclosure was pending, on the 19th of July, 1845, both of the stores, 29 and 31 Broad Street, were destroyed by fire, and nothing was left of the party wall except the stone foundation.

Immediately after the fire, Sherred proceeded to rebuild the store on lot No. 31, extending it a little further in depth than the former building. In rebuilding, her contractors commenced on the stone foundation of the former wall between the stores on 29 and 31, and after raising it with stone about a foot higher than the stone wall was before, built upon it with brick, the side wall of her store, four stories high. The new wall, built at the sole expense of Sherred, thus stood one half on her lot, and the other half on the Duryee lot. Her store was finished in the fall of 1845.

The bill charged that she built this wall after applying to Duryee's heirs to unite with her in so doing, with their assent and approval, and on their agreeing to pay half the expense, if they could obtain the money to rebuild their store. These statements were put in issue, and were not proved.

The foreclosure of Duryee's mortgages resulted in a decree for a sale, under which the defendant Cisco became the purchaser of lot 29, for \$15,600, at a sale made by a master in chancery on the 27th of January, 1847. The master conveyed the lot to him on the 15th of February, 1847. The defendant, soon after his purchase, built a warehouse or store on lot 29, and used the wall so built by Sherred for one of the side walls of his store, inserting therein his timbers and beams. The first story of his store extended to the same depth as Sherred's new store, but the upper stories did not extend as far back from the street, by about fourteen feet, as Sherred's store extended. As to those stories, the portion of the party wall not used by the defendant was shown to be a detriment to him, rather than a benefit.

Sherred applied to the defendant to pay half the value of the wall as used by both parties, which he declined to do, on the ground that he purchased and paid for the half of it standing on his lot, at the master's sale. There was no proof that the defendant had any notice, till after he commenced building, that Sherred had built the party wall at her sole expense, or that she had not been paid for half of it, or that she claimed payment therefor. It was proved that the value of the half of that part of the party wall which the defendant made use of in constructing his store, was \$459.14. The value of the entire wall built by Sherred between, upon the two lots, was \$1146.

J. T. Brady, for the complainant.

W. C. Wetmore and *M. S. Bidwell*, for the defendant.

BY THE COURT. SANDFORD, J. The plaintiff relies entirely on the case of *Campbell v. Mesier*, 4 John. Ch. R. 334, and 6 Ibid. 21, to sustain this suit. It was there decided, that where there was an old party wall standing between two houses, which had become ruinous, and the owner of one of the houses being desirous to rebuild his house

after notice to the owner of the other, and a request to him to unite in the work, took down the old wall and rebuilt it on the same site, with and for his new house, the owner of the adjoining house was bound to contribute ratably to the expense of the new wall; but not beyond the extent of the height and quality of the old wall. It was in effect held also, when the case was before the chancellor on the equity reserved in 6 J. C. R. 21, that a purchaser of the house from the owner thus liable, took it subject to the charge upon it for contribution. But we suppose this was on the ground that the purchaser was aware of the claim of his neighbor for contribution when he purchased, as was apparent from his taking a covenant of indemnity in respect of the use of the party wall, in his deed of the house.

We think this case differs from *Campbell v. Mesier*, so far that the decision of the latter is not controlling. In the first place, the defendant bought his lot with the new wall upon it, without notice of the plaintiff's claim. Next, when the wall in question was built by the plaintiff, there was no party wall in existence. There had been a wall, which served as a partition between the two stores (whether properly called a *party wall* or not, in the sense used by the chancellor in the case cited, we will not here inquire), but it was destroyed with those stores. The stone foundation that remained does not alter the matter. Either party could remove so much of it as rested on his ground, with the rubbish on his lot, on preparing to rebuild. Then the plaintiff on one side, and the mortgagees on the other, Duryee's heirs really having no interest in the subject, owned two adjoining vacant lots in severalty, where there had once been a partition wall forming the mutual support of two adjoining buildings. The plaintiff, without notice to the mortgagees, and without their assent or knowledge, rebuilt her store, and placed the partition wall on the site of the former one. There was no "equality of right and interest" in an existing wall, which it was necessary, for the two houses then supported by it, should be rebuilt, and in which wall the parties "had an equal interest," as was the chancellor's view of the facts in *Campbell v. Mesier*. These parties had no such interest, for they had no joint or common interest whatever. Each owned in severalty the half of the ground on which the former wall stood. Neither was under any obligation or duty to build upon his lot, or to suffer the other party to place part of a division wall upon it. The principle of contribution applicable to tenants in common of a mill, and to the discharge of a common burden or charge upon lands held in common, is therefore not applicable to this case; and we think it is not governed by the principle of the chancellor's decision in the authority relied upon by the plaintiff.

By the common law, every owner of land is his own judge of the propriety of building upon it or leaving it vacant; and when he does build, of the manner and extent of his buildings. In the absence of statutory provisions, he may build with what material he pleases, and he is under no obligation to give to his neighbor any use or advantage of his land,

by way of support, drip, or easement of any description. If a stranger dispossess him, or enter upon his unoccupied property, erect buildings, and make valuable permanent improvements upon it, he is not under the slightest obligation to recompense such stranger for any portion of the expense, on recovering the possession of the land. So unyielding is this doctrine, that a mortgagee in possession will not be allowed, on redemption by the mortgagor, for the expense of clearing up unproductive wild lands mortgaged (*Moore v. Cable*, 1 J. C. R. 385); and where a vendor breaks off a contract of sale, the vendee cannot recover for his improvements made on the lands sold, while in possession under the contract. *Gillet v. Maynard*, 5 John. R. 85. Whether the entry were tortious, or in the most perfect good faith, the common law is uniform in refusing to permit the real owner of the land to be benefited without his own request or sanction. And if one, having made valuable erections on the land of another, while in possession under a claim of title, remove the buildings from the land before the owner recovers possession, he is liable in trespass for their value. *Dewey v. Osborn*, 4 Cowen, 329; and see *Erwin v. Olmsted*, 7 Ibid. 229. The rule allowing defendants in ejectment, in a suit against them for mesne profits, to retain, in *diminution of the recovery*, the value of permanent improvements made in good faith, does not trench at all upon this principle. *Jackson v. Loomis*, 4 Cowen, 168; *Van Alen v. Rogers*, 1 John. Cas. 281. That action is one for damages administered on equitable principles, and justly limited to the injury actually sustained.

We perceive no ground upon which the plaintiff can maintain her suit, that will not give a like remedy for all permanent valuable erections made in good faith, by all persons on lands which they do not own. It was argued that the fact of there having formerly been a partition wall (which we will call a party wall), gives the right to have it continued for all time to come. To test this argument fairly, we will assume, what is not proved, but may, perhaps, be fairly inferred, that the old wall was built by the mutual agreement, and at the joint expense, of the then proprietors of the two lots. It is not disputed that each proprietor remained the owner in severalty of the ground on which half of the wall rested, and of course each owned in severalty one half of the wall. Neither party had a right to pull down the wall without the other's consent; and to that extent, the agreement upon which it was erected controlled the exclusive dominion which each would otherwise have had over the half of the wall, as well as over the soil on which it stood. The case of *Campbell v. Mesier*, it may be said, is an authority that each was bound to keep the wall good on its falling into decay; but that case proceeded upon the footing that each had an equal interest in the party wall, of the same nature as that of tenants in common, and the fact here is clearly otherwise.

The parties being confessedly restrained from destroying the wall without mutual consent, how is it when the wall has been destroyed by the elements? The lands on each side are vacant. The agreement

upon which the party wall was built related to that wall only. There was no agreement to build a second wall, or to build houses a second time, in the event that the original wall, and the houses which it supported, should be destroyed. Neither party, perhaps, thought of such an event. If they had, it by no means follows they would at that time have stipulated for a second joint wall. It might well have occurred to them, that if the buildings were destroyed, one or the other might not wish to rebuild; or that one might desire to erect a very strong warehouse for heavy goods, requiring thick walls, and the other a private dwelling, with a wall only half as thick. But without pursuing the views which parties may well be supposed to entertain, on their attention being called to the event of a total destruction of the building they are about to erect on a party wall, it suffices to say, that when two owners of adjoining city lots unite in building two stores with a party wall, we have no right to infer, from that act, an agreement binding upon them and their heirs and assigns to the end of time, to erect another like party wall at their mutual expense, when that one is casually destroyed, and so on, as often as the new one shares the same fate.

Suppose in this case that the foreclosure of Duryee's mortgages had terminated, and the defendant had purchased the Duryee lot, before the plaintiff commenced rebuilding her store. If the doctrine contended for in her behalf be correct, she could have compelled the defendant to join in building a new party wall, or on his refusal, built it herself, and recovered from him half the expense. Suppose the defendant had said, on being requested to join in the party wall, I bought this lot at a public sale, without notice of any such right as you claim, and my recorded title shows nothing of the kind. Would not this have been a conclusive answer to the request? Suppose further, that on the plaintiff's assuming to build the new party wall, the defendant had forbidden her placing any part of it on his land. Could he not have maintained trespass every day against her workmen while building it, and when finished, could he not by an ejectment have compelled her to take it down? It seems to us these questions must be answered in the affirmative, and that the result overthrows entirely the claim of right based upon the former party wall.

But it is said the defendant made use of the new wall when he built on his lot, and thus ratified it as a party wall; and it will be unjust to permit him to have the benefit of it without making compensation.

As to the injustice alleged, it is very well answered that the defendant bought this lot at a judicial sale; and, so far as we know, paid for it all that it was worth, including the half wall then standing upon it, and a judgment in this suit compelling him to pay the plaintiff for the same half, will make him pay for it twice. But whether that be the result of our decision, or it have the effect to give him the half of the wall for nothing, it cannot change the rule of law which governs the case.

Then what is the effect of his using the party wall? He found it on

his land, on taking possession. He wanted to build. Was he to tear it down or insist on the plaintiff's removing the half wall, so that he could occupy his whole land? This he might have done, *Wigford v. Gill*, Cro. Eliz. 269, to her great injury, and with probably no advantage to himself. Or was he not entirely at liberty to use as his own, an erection on the land he had bought, without subjecting himself to pay for work done without his request or knowledge? We think he was. We do not see how the defendant is liable to pay for half of this wall, because he used it, any more than he would have been liable, if the Duryees had rebuilt before he bought, and had put their beams into the wall, without paying the plaintiff for it. Yet the proposition would be at once scouted, that the purchaser of a house in this city, having paid to the owner the price, in good faith and without notice, would be liable to the owner of an adjoining house, for the unpaid half of the cost of the party wall which separated the two tenements.

We think we have shown that this case is not governed by *Campbell v. Mesier*, whether regarded as arising between the mortgagees of Duryees's lot and the plaintiff, or between her and the defendant. We will next consider the plaintiff's point, that successive owners of city lots, situated as these were, are bound to rebuild party walls when destroyed, because of an equitable liability founded on a duty arising from the fact that the parties are at least *quasi* tenants in common of such party walls. This idea of *quasi* tenancy in common comes from the civil law, and we think has no foothold in our law. It is true, we find two cases in England, in which it was held that common user of a wall separating adjoining houses belonging to different owners, is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those houses in equal moieties, not as *quasi*, but as actual tenants in common. *Wiltshire v. Sidford*, 1 Man. & R. 404; *Cubitt v. Porter*, 8 Barn. & Cr. 257.

But it was decided in *Matts v. Hawkins*, 5 Taunt. 20, that although a party wall be erected at the joint expense of the two proprietors of the lots on either side, one half of the thickness of it standing on the land of each, they are not therefore tenants in common of the wall or of the land on which it stands. The property in the wall in such a case follows the property of the land which supports it. This, it should be observed, was in London, after the passage of the Building Act, 14 Geo. III., ch. 78, which regulates the subject of party walls; and its authority was fully recognized in both the cases in the King's Bench last cited. The principle of the decisions is, that while the common user is presumptive evidence of a tenancy in common in the land and wall, that presumption is rebutted by proof of the precise extent of the land originally belonging to each owner, and each is then deemed the exclusive owner of so much of the wall as stands on his own land (*Gale & Whately on Easements*, 296). We also refer to *Peyton v. Mayor, &c. of London*, 9 B. & Cr. 725.

The Roman law contained numerous refined and minute regulations

respecting prædial servitudes, both rural and urban, which are unknown to the common law; and among the number are most of those respecting party walls (Digest, lib. 8, tit. 2, l. 13, 19, 20, 25, 32, 33, 36, 40). These are also made the subject of many provisions in the French law (Code Civil Français, liv. 2, tit. 4). The second chapter of the Code Civil, which contains the sections cited by the learned chancellor in *Campbell v. Mesier*, is entitled "Of servitudes established by law," as distinguished from those derived from the situation of places. Among these positive enactments is one which gives to each joint proprietor the right to place beams in the whole thickness of the wall, within two inches (*cinquante-quatre millimètres*) of the opposite side (§ 657), which is very different from our notions of the use of a party wall. It may well be that sound policy dictates similar legislation in this State; but we do not feel at liberty to import doctrines from the civil law, however benign or equitable, which conflict with established common law principles.

In Pennsylvania, the subject of party walls in the city of Philadelphia was regulated by Statute one hundred and thirty years ago (1 Laws of Penn. ch. 242, p. 124, &c.; Act of 1721). By that Statute, the foundation, breadth, thickness, &c., were to be prescribed by the city surveyors, or regulators; and the same officers determined the compensation to be paid by the builder on the adjoining lot, on his inserting his beams. These matters were not left to the unregulated judgment of experts and witnesses called by the parties interested, as would be the case in our law, if the plaintiff's view of it be sustained. The Act provided expressly that the first builder should be reimbursed one moiety of the wall, or of so much of it as the next builder should use; but it was decided in *Ingles v. Brighthurst*, 1 Dall. 341, that the first builder had no lien for this reimbursement upon the adjoining land, and that it was only a personal charge against the next builder.

The provision in the Act of 1818, and the ordinances of the Common Council of the city of New York under the same, to which we were referred by the plaintiff's counsel, do not apply to party walls; they relate to walls and fences separating enclosures. The Statute itself speaks of fences only (2 R. L. 134, § 20; Corporation Ordinances, 1845, ch. 48).

Upon the whole, we are clear that the plaintiff is not entitled to recover, and her bill must be dismissed with costs.¹

¹ See *Antomarchi's Ex'or v. Russell*, 68 Ala. 356; *Heartt v. Kruger*, 121 N. Y. 386, accord. See *Brondage v. Warner*, 2 Hill, 146; *Partridge v. Gilbert*, 15 N. Y. 601; *Hoffman v. Kuhn*, 57 Miss. 746; *Shile v. Brokhahus*, 80 N. Y. 614; *Putzel v. Drovers' & Mechanics' Natl. Bank*, 78 Md. 349; *Walker v. Stetson*, 162 Mass. 86.

On statutory provisions concerning party walls, see Stimson, Am. Stat. Law, sec. 2170.

BROOKS v. CURTIS.

COURT OF APPEALS OF NEW YORK. 1872.

[Reported 60 N. Y. 639.]

APPEAL from judgment of the General Term of the Supreme Court in the Fourth Judicial Department, modifying judgment in favor of defendants, entered upon the decision of the court at Special Term, and affirming judgment as modified.

This action was brought to compel defendants to remove certain encroachments alleged to have been placed by defendants upon the premises of plaintiff, and to restore the property to its former condition.

The parties are the owners of adjoining premises, situate in the city of Rochester. In 1846 one Everard Peck owned both premises. He deeded to plaintiff, in July of that year. At that time Peck had begun the construction of a three-story brick building upon the lot. The easterly line of the premises conveyed to plaintiff is thus given in the deed: "Beginning at a point on the north of Buffalo Street, . . . opposite the centre of the brick wall which said party of the first part is now erecting as the west wall of a block of stores; thence northwardly through the centre of said brick wall seventy-nine feet." In 1855, plaintiff erected a three-story building, using the wall as the east wall thereof. In 1856 the defendants acquired title from the executors of Peck to the balance of the lot. In 1866 they added two additional stories to their building, — building up the party wall for that purpose. They also lowered the ceiling of the upper story of the building, as it was, some six feet, letting the joists into the old wall, and, to secure them, passed iron anchors through the wall, fastened on the west face of the wall by nuts and plates. The anchors were inserted with the verbal consent of plaintiff. The latter gave no consent to raising the wall. After the addition was completed, ice and snow from the roof of defendants' building fell upon plaintiff's roof, doing some damage.

The court directed the dismissal of the complaint, and judgment was entered accordingly.

The judgment of the General Term was as follows: "Judgment modified so as to restrain the defendants from maintaining their roof in such manner and of such construction that the water and snow from it, and the ice formed from the waters falling from it, descend upon the roof of the plaintiff's adjoining building. As thus modified, judgment affirmed, without costs of this appeal to either party."

James C. Cochran, for the appellant.

W. F. Cogswell, for the respondents.

RAPALLO, J. The deed from Everard Peck to the plaintiff states that the wall in controversy was, at the time of the conveyance, being erected by Peck as the west wall of a block of stores. The centre line

of the wall is, by the deed, made the easterly boundary of the land conveyed, which includes the land on which the westerly half of the wall stands. It appears that Peck's stores were afterward completed, and the plaintiff erected a building upon his own lot, using the wall as a party wall, and inserting in it the joists of his building. Peck afterward conveyed to the defendant, who made the addition to the height of the wall.

We think that the language of the deed and the acts of the parties show that it was their intention that the wall should be a party wall for the common use of both lots. The deed states that Peck was at the time erecting the wall, half of which was conveyed, and that it was to be the west wall of his block. This implies that the wall was not then completed, and that Peck was to have the right to complete it and use it as the west wall of his block. If the deed is to be treated as an absolute conveyance, free from any reservation, easement, or privilege in the co-owner of the wall, Peck would have had no right to proceed to complete it, or, at least, that part which was beyond his line, after the conveyance. It cannot be supposed that such was the intention of the parties. Subsequently to this conveyance the wall has been used for more than twenty years as a party wall.

Although land covered by a party wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled; and an important question in this case is whether such easement includes the right to increase the height of the wall, provided such increase can be made without detriment to the strength of the wall or to the property of the adjacent owner.

This question, in the absence of statutory regulations upon the subject, does not seem to have been distinctly settled by authority; but the fact appears in several of the cases relating to party walls that the height had been increased, and there is no intimation that such increase was unlawful. *Matts v. Hardkins*, 5 Taunton, 20, was an action of trespass. The plaintiff had added to the height of a party wall, and the defendant tore down the addition, for which injury the plaintiff brought trespass. The only point decided was that the parties were not tenants in common of the land, and therefore the action of trespass could be maintained. In *Campbell v. Mesier*, 4 Johns. Ch. 334, a party wall, standing equally on two lots, having become ruinous, the owner on one side, against the will and in spite of the prohibition of the adjacent owner, pulled down the wall and rebuilt it higher than it was originally. It was held that the adjacent owner was bound to contribute to the expense of the new wall, but not to the extra expense of making it higher than the old. There is no intimation in the case that the increase of height was wrongful. In *Partridge v. Gilbert*, 15 N. Y. 601, the new wall built by the defendant was not only higher, but its foundations were deeper than the old wall which it replaced. The right to make these additions was not, however, discussed in the case, and perhaps

there was no occasion to discuss it; the action being brought by the tenant of the adjacent lot, whose goods were injured in making the repair, and not by the owner.

In *Eno v. Del Vecchio*, 4 Duer, 53, it was held that the owner on one side of a party wall might, for the purpose of improving his own premises, underpin the foundation of the wall and sink it deeper if he could do so without injury to the building on the adjoining lot; also, that he might increase, *within the limits of his own lot*, the thickness, length, or height of the wall, if he could do so without injury to the building on the adjoining lot. Whether he could raise the whole party wall higher, or whether any additional elevation must be wholly within the limits of his own lot, the court expressly declined to decide.

We think that the right of either of the adjacent owners to increase the height of a party wall, when it can be done without injury to the adjoining building, and the wall is clearly of sufficient strength to safely bear the addition, is necessarily included in the easement. No adjudication adverse to that right has been referred to by counsel or found by us. The party making the addition does it at his peril;¹ and if injury results, he is liable for all damages. He must insure the safety of the operation. But when safe, it should be allowed. The wall is devoted to the purpose of being used for the common benefit of both tenements. In *Hendricks v. Stark*, 37 N. Y. 106, it is held that a party wall is in no sense a legal encumbrance upon either property;² that the mutual easements of adjoining proprietors in such walls are a mutual benefit to each, and not a burden, but a valuable appurtenant which passes with the title to the property. This is undoubtedly correct, provided each party is allowed to derive from the wall all the benefit which it is capable of affording without detriment to the other. But if, though of sufficient strength, it cannot be used by either party in increasing the height of his building, it may prove a serious injury to the property of one desiring to make that improvement, — an improvement which is very usual and often very necessary in crowded cities. The fairer view, and the one generally adopted in legislative provisions on the subject in this and other countries, is to treat a party wall as a structure for the common benefit and convenience of both of the tenements which it separates, and to permit either party to make any use of it which he may require, either by deepening the foundation or increasing the height, so far as it can be done without injury to the other. The party making the change, when not required for purposes of repair, is absolutely responsible for any damage which it occasions (*Eno v. Del Vecchio*, 6 Duer, 17); but in so far as he can use the wall in the improvement of his own property, without injury to the wall of the adjoining property, there is no good reason why he should not be permitted to do so.

¹ See *Negus v. Becker*, 143 N. Y. 303.

² *Bertram v. Curtis*, 31 Iowa, 46. But see *Mackey v. Harmon*, 34 Minn. 168; *O'Neil v. Van Tassel*, 137 N. Y. 297.

The judge has found that the wall was sufficiently strong to be of the increased height without any injury thereto. He has further found that the carrying up of the wall, under claim of right, was with the knowledge of and without objection from the plaintiff; and that the anchors were inserted with his verbal assent. We think the judge was right in his conclusion of law, that the plaintiff was not entitled to relief, so far as the carrying up of the wall and insertion of the anchors were concerned.

The court at General Term, however, modified the judgment in respect to the roof, so as to restrain the defendants from maintaining it of such construction as to cause water, snow, and ice to fall upon the roof of plaintiff's building. This modification is not appealed from. In making it, the General Term necessarily held that the Special Term should not have dismissed the complaint, but should have granted that part of the relief prayed for which is embraced in the modification, and should have denied the residue; and it is claimed that the judgment of the General Term is erroneous in affirming the dismissal of the complaint with the modification referred to. The appellant is technically correct in this claim. The more proper form would have been simply to modify the judgment, and render such judgment as the Special Term should have rendered. But the objection is one of form merely, except so far as the question of the costs awarded at Special Term is concerned. This being an equitable action, costs were in the discretion of the court below; and it had power, either at Special or General Term, to decree costs in favor of the defendants, although some part of the relief prayed for was granted. We will not, therefore, disturb the judgment on that ground.

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

NORMILLE v. GILL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1898.

[Reported 159 Mass. 427.]

BILL in equity, filed October 18, 1892, praying that the defendant be restrained from using a wall put by him on the line dividing the estate of the plaintiffs from that of the defendant for any other purpose than that of resting timbers thereon, and that he be restrained from building windows therein.

Hearing before *Hammond, J.*, who entered a decree for the plaintiffs, and the defendant appealed to this court. The material facts appear in the opinion.

¹ *Everett v. Edwards*, 149 Mass. 588; *Matthews v. Dixey*, id. 595, accord. But see *Calmelet v. Sichel*, 48 Neb. 505.

S. L. Whipple for the defendant.

J. R. Murphy, for the plaintiffs.

ALLEN, J. The principal question is whether the owner of land in building a party wall partly upon his own land and partly upon that lying adjacent has a right, against the objection of the adjacent owner, to leave openings in the wall for windows, to be used for his own convenience until such time as his neighbor shall build upon the adjacent land. We are of opinion that he has no such right. The ownership of the land under a party wall remains in the several owners, subject to the easement of supporting the building upon each lot by means of the common wall. This easement is limited to what is necessary for that purpose. The maintenance of windows by one owner against the objection of the other is inconsistent with the title and rights of the latter. By usage the words, "party wall" and "partition wall" have come to mean a solid wall. Various reasons of inconvenience or peril have been assigned for the doctrine, but they are all referable, we think, to the general doctrine that the easement is only a limited one, and it is not to be extended so as to include rights and privileges not belonging to the character of a wall which is to be owned in common, and in which the rights of each owner are equal. This question has not heretofore been determined in this State, though other questions relating to party walls have arisen. *Vinton v. Greene*, 158 Mass. 426; *Everett v. Edwards*, 149 Mass. 588; *Matthews v. Dixey*, 149 Mass. 595; *Quinn v. Morse*, 130 Mass. 317; *Phillips v. Bordman*, 4 Allen, 147. The decisions in these cases are not directly applicable; but in other States the almost uniform current of decision has been against the right to leave such openings in party walls. *Partridge v. Gilbert*, 15 N. Y. 601, 614; *Brooks v. Curtis*, 50 N. Y. 639; *St. John v. Sweeney*, 59 How. Pr. 175; *Traute v. White*, 1 Dick. 437; *Vollmer's Appeal*, 61 Penn. St. 118; *Milne's Appeal*, 81 Penn. St. 54; *Ingals v. Plamondon*, 75 Ill. 118; *Gibson v. Holden*, 115 Ill. 199; *Bloch v. Isham*, 28 Ind. 37; *Sullivan v. Graffort*, 35 Iowa, 531; *Graves v. Smith*, 87 Ala. 450; *Dauenhauer v. Devine*, 51 Tex. 480; 3 Kent, Com. 437, note.

*Decree affirmed.*¹

b. ARTIFICIAL WATERCOURSES AND DRAINS.

WOOD v. SAUNDERS.

CHANCERY. 1875.

[Reported L. R. 10 Ch. 582.]

By an indenture of lease dated the 9th of June, 1870, L. B. Knight Bruce and H. Saunders and his trustees demised to William Wood

¹ See *Barry v. Edlavitch*, 84 Md. 95.

the mansion and grounds near Roehampton, called the Priory, with the out-offices, gardens, and pleasure-grounds thereto belonging, containing 9a. 2r. 8p. or thereabouts; together with the free passage and running of water and soil in and to the existing cesspool, and in and through all the drains, sewers, and watercourses then constructed or thereafter to be constructed through the adjoining property of the said L. B. Knight Bruce, for the term of two years; and by the same indenture the lessee had the option of purchasing the premises for £10,000. The lessee exercised that option, and by an indenture dated the 21st of May, 1872, L. B. Knight Bruce and the trustee of a term granted and released unto William Wood, his heirs and assigns, all that messuage or mansion-house situate near Roehampton, in the parish of Putney, in the county of Surrey, called the Priory, being the hereditaments comprised in the thereinbefore stated lease of the 9th of June, 1870, with the out-offices, stables, buildings, gardens, and pleasure-grounds thereto belonging, . . . together with the free running of water and soil in and to the existing cesspool, and in and through all the drains, sewers, and watercourses constructed or thereafter to be constructed through the adjoining property of the said L. B. Knight Bruce, his heirs or assigns; and together with all buildings, ditches, ways, sewers, drains, watercourses, liberties, privileges, easements, and appurtenances whatsoever to the said messuage and premises belonging, or in any wise appertaining, to have and to hold the hereditaments and premises thereby assured unto and to the use of W. Wood, his heirs and assigns forever.

The only cesspool then existing on the adjoining property of L. B. Knight Bruce was an open ditch or moat, at a distance of 150 yards from the Priory House; and the only drains, sewers, or watercourses then constructed were drains which conveyed the water or soil from the Priory House to the above-mentioned ditch or moat.

At the dates of the lease and of the conveyance the Priory House was adapted for about twenty-five inmates, and a part only of the drainage from the house ran into the ditch or moat. In 1873 W. Wood altered the drains and made them all discharge into the ditch or moat. He also enlarged the house and turned it into a lunatic asylum, in which nearly 150 persons were resident. The consequence was a large increase in the volume of night-soil and drainage, creating, as the defendant Saunders alleged, an intolerable nuisance.

The defendant Saunders appeared to be in possession of the cesspool in question and of the other lands of L. B. Knight Bruce under an agreement made with L. B. Knight Bruce for granting building leases, and had taken proceedings against the plaintiff Wood in respect of the drains as for nuisance, and had, as the plaintiff alleged, threatened to stop up the drains from the Priory.

The plaintiff thereupon filed the bill in this suit to restrain the stopping up of the drains.

An injunction was granted on motion on the usual undertaking for damages.

SIR CHARLES HALL, V. C., expressed his opinion that the plaintiff and the defendant were each partly right and partly wrong. The question was as to the right conferred by the grant, and His Honor agreed with the defendant that the right of the plaintiff was not enlarged by the grant, but stood as it was at the date of the lease.

The question, therefore, to be determined was, what was the construction of the lease as granting a right during the continuance of that tenancy. It was argued on behalf of the defendant that it was not to be construed, as an ordinary grant, most strongly as against the grantor, but that the onus lay upon the owner of the dominant tenement to show that he had the right irrespective of any such rule of construction. But there was no authority cited in favor of that proposition as applicable to an easement created by grant. The cases referred to were cases of easements originating by user. No doubt that was ordinarily supposed to be under a grant; but there were not in those cases the terms of the grant to be construed, which, according to the ordinary rule, as between grantor and grantee were to be construed most strongly against the grantor.

There were, however, authorities which were clearly the other way. In *Williams v. James*, Law Rep. 2 C. P. 577, 582, Mr. Justice Willes expressly laid down the law to be so in the case of an easement. and the Vice-Chancellor Malins, in *United Land Company v. Great Eastern Railway Company*, Law Rep. 17 Eq. 158, 162, referring to the case of *South Metropolitan Cemetery Company v. Eden*, 16 C. B. 42, laid down the same rule for construing grants of easements.

In this deed, however, there was quite enough to enable the court to put a construction upon it without resorting to any such rule. His Honor then stated and commented on the words of the deeds, observing that in the conveyance there were the usual general words, which were almost always unmeaning, and sometimes contained a reference to easements which had been extinguished.

The defendant had denied that this ditch was the cesspool in question, but in that on the evidence he had failed. He had also failed to prove the representations which he alleged had been made to him by the plaintiff as to the use to be made of the Priory. There had been a stipulation in the lease that the buildings were not to be altered without the lessor's consent, which was never asked for. The right to the passage of soil was not an unrestricted right, but was at that time to some extent limited, as the mansion-house could not be enlarged without the consent of the lessor; and it must be held that the grant was on the same terms as the lease. The words as to the passage of soil could not be held to apply to any additions to the buildings. The plaintiff, therefore, had not made out a right to the passage of soil and water from the building in its enlarged state. It had been said that the right must be construed with regard to the size of the pipe or ditch; but there was no authority for that proposition. In ascertaining the extent of the right of user of a road when the condition of the adjoining property has been

altered, the fact that there was plenty of room in the road had never been taken into consideration. The right must be measured according to the principle laid down by Mr. Justice Willes in *Williams v. James*, Law Rep. 2 C. P. 577, as a reasonable use for the purpose of the land in the condition in which it was when the user took place; that is, in the case of this mansion, in the state in which it was when the grant was made. The matter must, however, be looked at reasonably, and no small addition to the house would be improper. Here there had been a very large increase.

It had also been argued that the easement must be measured by the quantity which the ditch would contain; but there was no authority for such a doctrine, which would give rise to very difficult questions. Some similar questions might no doubt arise in this case, as the owner of the easement might send down so large a quantity as not to leave room for the quantity sent by the owner of the land; but this would probably be of much less importance.

The defendant was wrong as regarded his contention as to the cesspool, and the plaintiff was right in his claim to use the moat or ditch as a cesspool, but not to the extent to which he had claimed. The plaintiff would therefore have no costs, and there would be no inquiry as to damages suffered by the defendant.¹

Mr. Lindley, Q. C., *Mr. Tindal Atkinson*, and *Mr. J. H. B. Browne*, for the plaintiff.

Mr. Greene, Q. C., *Mr. Chitty*, Q. C., and *Mr. Warmington*, for the defendant.

¹ The case was carried to the Court of Appeal, where the Lords Justices JAMES and MALLIS concurred in the construction which the Vice-Chancellor had put upon the grant, but ordered the decree varied, so as to stand as follows: "That an injunction be awarded to restrain the plaintiff from allowing the drainage from the additional buildings erected by him to go into the cesspool in the bill mentioned. Restrain the defendant from preventing the free passage of water and soil into the existing cesspool, being the moat or ditch in the bill mentioned. No inquiry as to damages; no costs to either party."

"If the judgment of the Vice-Chancellor Hall [in *Wood v. Saunders*] is looked at as fully set out in [28] Weekly Reporter [514], instead of the short note of it in 10 Ch. D. 588, it will be seen that what he went on was the express terms of the grant as construed with regard to the circumstances disclosed on the face of the deed. He considered that the grant of a right of sewage was limited to the existing house, because, amongst other reasons, the power to make any substantial change in the house was expressly negatived, as the deed required the house to remain as it was." NORTH, J., in *Mayor of New Windsor v. Stovell*, 27 Ch. D. 665, 672 (1884).

See *Darlington v. Painter*, 7 Pa. 473; *Noyes v. Hemphill*, 58 N. H. 536. Cf. *Jenison v. Walker*, 11 Gray, 423; *Onthank v. Lake Shore R. R. Co.*, 71 N. Y. 194.

SHAUGHNESSEY v. LEARY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[Reported 162 Mass. 108.]

BILL in equity, to restrain the defendant from preventing the plaintiff from using and repairing a drain which ran through the defendant's land. Trial in the Superior Court, before *Hammond, J.*, who reported the case for the consideration of this court, in substance as follows.

By deed dated April 6, 1866, one Bowker conveyed to the plaintiff an estate in East Boston, described as follows: "Northwesterly by Lot 210, thirty-six feet (36 ft.); northeasterly by lot No. 1, on a plan hereinafter mentioned, seventeen feet, two and one half inches (17 ft. 2½ in.); southeasterly on lot No. 8, on said plan, thirty-six feet (36 ft.); and southwesterly by a common passageway ten feet (10 ft.) wide always to be kept open, seventeen feet, two and one half inches (17 ft. 2½ in.). The land above described is lot No. 9 on Noble's plan of subdivision of Lot 209 and part of Lot 101, Section 1, East Boston, recorded with Suffolk Deeds, April 4, 1866, with deeds given to John Kenney and Margaret Walsh. Together with the right and privilege in common with others legally entitled thereto to pass and repass on and over and through said ten-foot passageway and on, over, and through the twelve-foot passageway to Everett Street, and also of draining under said passageways in a drain to be built thereunder if any shall be so built, in common with the others thereto legally entitled, the grantee paying his proportionate part of constructing said drain and of keeping the said drain and passageways in good condition and repair, said passageways to remain forever open and unobstructed."

By deed of even date Bowker conveyed to one Cronin another estate in East Boston, described as follows: "Beginning at a point in the westerly line of a twelve-foot passageway which point is distant fifty-four feet southwesterly from Everett Street, thence the line runs by the westerly line of said passageway southwesterly thirty-six feet to the northerly line of a ten-foot passageway laid out in the rear of lots numbered 209 and 101, as shown on the plan hereinafter mentioned, then turning at a right angle and running northwesterly by the northerly line of said ten-foot passageway thirty-four feet eight and one half inches, then turning at a right angle and running northeasterly by lot numbered 7 on the plan hereinafter mentioned thirty-six feet, then turning and running southeasterly by lots numbered 3 and 4 on said last named plan thirty-four feet eight and one half inches to the point of beginning. Being the lots numbered 5 and 6 on plan of subdivision of Lots 209 and 101 aforesaid, recorded with Suffolk Deeds, Liber 875, folio 37," followed by a provision similar to that in the deed to the plaintiff.

At the time of these conveyances, there was upon each lot a brick dwell-

ing house, the plaintiff's house being the northwesterly and Cronin's the southeasterly house in a block of three houses situated upon the north-easterly side of the ten-foot passageway mentioned in the deeds. On each lot in the rear of the house was an ordinary wooden privy, having a vault not connected with any drain, the vault being cleared out from time to time, as occasion required. There was also a wooden drain about a foot square, starting from the rear of the plaintiff's house, and running over the rear of each lot of the block, including the Cronin lot, in a line substantially parallel with said ten-foot passageway, and connecting with a private drain in the twelve-foot passageway mentioned in the Cronin deed, which last drain connected with the public sewer in Everett Street. The drain which thus ran in the rear of the block was used for the ordinary waste water of the kitchen in the plaintiff's house, but was not used for water-closet drainage, meaning thereby human urine and human excrement; and such use was continued by the plaintiff from the time of said conveyance to him until the year 1878, at which time, by order of the board of health, the privies and vaults were removed, and at the joint expense of the owners of the block, including the plaintiff and Cronin, a tight earthen drain about ten inches in diameter, placed about one foot below the surface of the ground, was substituted for the wooden drain, being laid inside thereof; and from that time until the earthen drain was interfered with by the defendant, as hereinafter stated, this wooden drain served no other purpose than as a covering for the new drain; and the new drain was used not only for the kind of drainage for which the wooden drain had been used, but also for the passage of water-closet drainage, water-closets having been constructed in each house and connected with the earthen drain at the time it was laid.

In June, 1888, Cronin by a warranty deed conveyed his lot to the defendant, who, until shortly before the filing of the bill, was ignorant of the existence of the drain. As soon as she became aware of its existence, she denied the right of the plaintiff to use and maintain it, and under a claim of right stopped it up and otherwise injured it.

The judge made an interlocutory decree that "the plaintiff has the right of drainage of his waste water (excluding water-closet drainage) through the defendant's land as the drain now runs; that the plaintiff has no right to pass water-closet drainage through the defendant's land; and that forty-five days are to be given to the plaintiff to adjust his drain in accordance with his rights as herein declared; and the cause is reserved for further action on this basis." The plaintiff appealed to this court.

The case was argued at the bar in March, 1894, and afterwards was submitted on the briefs to all the judges.

W. B. Orcutt, for the plaintiff.

P. M. Keating, for the defendant.

HOLMES, J. The facts set forth in the report warranted a finding that the plaintiff had acquired a right by prescription to use the drain

for waste water, excluding water-closet drainage, as it had been used for more than twenty years. The wooden drain has been there from 1866. The laying of an earthen drain inside the wooden one, taken by itself, did not interrupt the running of time in favor of the plaintiff. The fact that this was done at joint expense has no greater effect as matter of law. The owner of the now servient tenement may have joined, as well because he yielded to a paramount claim, as on the footing of a license given by him and accepted by the plaintiff. Even if the continuance of the pipe itself was not a trespass or adverse, the use of it over the servient land by the plaintiff may have been adverse just as easily when the defendant's predecessor in title partly paid for it, as if the plaintiff had laid it wholly at his own expense.

The fact that the use of the drain was greater, in the character of the substances discharged into it, after 1878, does not prevent the gaining of an easement for the less burdensome use which was continued for twenty years. The same known or discoverable thing, the drain-pipe, remained unchanged in place during the whole time. A greater or more burdensome use of the drain did not make it a different drain, or destroy the character of such use as was continuous. The fact that a pipe from the water-closet was connected with the drain, in addition to a pipe from a sink, did not change the nature of the use from the sink. That the servient owner submitted to a greater use for a part of the time is no reason why his submitting to a less use for twenty years should not have its usual effect. And if the matter be approached from the side of the dominant owner, the feeling of right which grows out of habit certainly is no less because larger intrusions have been carried out successfully for a part of the time during which the less have been practised without dispute. *Baldwin v. Calkins*, 10 Wend. 167, 177; *Crossley v. Lightowler*, L. R. 2 Ch. 478, 481.

As the right was acquired before the defendant bought, it is not necessary to consider whether her ignorance of the existence of the drain when she took her deed would have affected the running of the necessary time. It did not put an end to the existing easement. The registry laws do not extinguish easements by prescription in favor of purchasers without notice. Pub. Sts. c. 120, § 4. See *Johnson v. Knapp*, 146 Mass. 70, 78.

We have discussed the question whether the plaintiff has any right in the drain, as both parties have treated that question as open on the report. Whether it is so or not we express no opinion. *May v. Gates*, 137 Mass. 389; *Moors v. Washburn*, 159 Mass. 172, 176; *Harris v. Harris*, 153 Mass. 439.

We cannot say that the plaintiff has a prescriptive right to discharge his water-closet through the drain. As we have implied already, the judge may not have found that the drain was maintained adversely, but only that the plaintiff's use of it was adverse. If so, it is not necessary to consider whether, if a drain had been laid and maintained adversely, it would carry the right to use it for all possible purposes, without re-

gard to the way in which it had been used in fact. If the easement is only a right to use, the right must be limited to use of the kind which has been made for twenty years. *Decree affirmed.*¹

C. Ways.

HOWELL v. KING.

COMMON PLEAS. 1674.

[Reported 1 Mod. 190.]

TRESPASS for driving cattle over the plaintiff's ground. The case was: A. has a way over B.'s ground to Black Acre, and drives his beasts over B.'s ground to Black Acre, and then to another place lying beyond Black Acre. And, Whether this was lawful or no? was the question, upon a demurrer.

It was urged, That when his beasts were at Black Acre, he might drive them whither he would.

On the other side it was said, That by this means the defendant might purchase a hundred or a thousand acres adjoining to Black Acre, to which he prescribes to have a way; by which means the plaintiff would lose the benefit of his land: and that a *prescription* presupposed a *grant*, and ought to be continued according to the intent of its original creation.

THE WHOLE COURT agreed to this. — *And judgment was given for the plaintiff.*²

TAYLOR v. WHITEHEAD.

KING'S BENCH. 1781.

[Reported 2 Doug. 746.]

TRESPASS for breaking and entering the close of the plaintiff, at the parish of Otley, in Yorkshire. The defendant pleaded: 1. The general issue; 2. A right of way, by prescription, through a lane of the plaintiff's contiguous to the *locus in quo*, to Otley Bridge on the River Wharfe: *that the tenants and occupiers of the locus in quo were, from time whereof, &c., by reason of their tenure, bound to repair the lane, and the banks thereof next to the river; that, at the several times*

¹ See *Masonic Temple Association v. Harris*, 70 Me. 260, 265.

On the liability of one whose land is traversed by a drain, for the escape of filth, see *Humphreys v. Cousins*, 2 C. P. D. 289. Cf. *Sutton v. Card*, W. N. (1886) 120.

² See *Skull v. Glenister*, 16 C. B. (N. S.) 81; *Davenport v. Lamson*, 21 Pick. 72; *French v. Marstin*, 32 N. H. 316; *Kirkham v. Sharp*, 1 Whart. 323; *Lewis v. Carstairs*, 6 Whart. 193; *Brightman v. Chapin*, 15 R. I. 166.

when, &c., the lane was out of repair and overflowed with water, so that the defendant could not use the way without imminent danger of the loss of his life, and goods; and that he *necessarily* went into, through, and over the *locus in quo*, as near to his said way as he possibly could, as it was lawful for him to do for the cause aforesaid; 3. That the *locus*, &c., lay contiguous to a lane of the plaintiff's, and that the said lane was adjoining to the River Wharfe; that the defendant had a right of way, by prescription, through and over the lane; and that, because the lane and way were *overflowed with water from the said river* so much that the defendant *could not* at the several times, &c., *pass or repass*, he did *necessarily* go out of the said way, as near to the said way as he possibly could, into, through, and over, &c.

The plaintiff having traversed the prescription to repair laid in the first special plea, and the right of way laid in the last, the cause came on to be tried, before *Lord Loughborough*, at the Summer Assizes for Yorkshire, 1780; and the jury found for the plaintiff on the general issue and the first special plea, and for the defendant on the last.

Afterwards, *Fearnly* obtained a rule to show cause why the plaintiff should not be at liberty to enter up judgment on *that* issue, as well as the others, notwithstanding the finding of the jury, on the ground that, in point of law, although the defendant had the right of way through the plaintiff's close, he was not entitled to go upon the adjoining land of the plaintiff when the way was out of repair.

Lee, Davenport, and Wood, for the defendant.

Walker, Serjt., for the plaintiff.

LORD MANSFIELD. The question is upon the grant of this way. Now, it is not laid to be a grant of a way, generally, over the land, but of a precise specific way. The grantor says, You may go in this particular line, but I do not give you a right to go either on the right or left. I entirely agree with my Brother *Walker*, that, by common law, he who has the use of a thing ought to repair it. The grantor *may* bind himself; but here he has not done it. He has not undertaken to provide against the overflowing of the river; and, for aught that appears, *that* may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public service; and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line.

WILLES and ASHHURST, JJ., of the same opinion.

BULLER, J. If this had been a way of necessity, the question would have required consideration; but it is not so pleaded. It does not appear that the defendant had no other road. There can be no ground for a repleader, for the plea is substantially bad; there is no fact alleged in it which it could serve any purpose to deny, or go to issue upon.

*The rule made absolute.*¹

¹ Part of the case relating to a point of practice is omitted.

When the owner of the servient tenement has obstructed a way, the owner of the dominant tenement may deviate. *Selby v. Nettlefold*, L. R. 9 Ch. 111 (see contra,

BALLARD v. DYSON.

COMMON PLEAS. 1808.

[Reported 1 Taunt. 279.]

IN replevin the defendant avowed taking a heifer damage feasant. The plaintiff pleaded a right of way to pass and repass with cattle from a public street through and along a certain yard and way adjoining to the said place, in which, &c., towards and unto certain premises in his own occupation, as appurtenant thereto, at all times, 1. by prescription; 2. by a grant from a person in whom he supposed the seisin in fee, as well of the yard and way, as of the plaintiff's premises, to have been united. The defendant, in his replication, took issue upon these rights of way. Upon the trial of this cause, at Hertford Summer Assizes, 1807, before *Mansfield*, C. J., it appeared that the plaintiff's building had anciently been a barn, but had not been used as such for a great many years; that the folding doors of it opened not to the plaintiff's yard, but to a highway; for many years it had been converted to the purposes of a stable; the last preceding occupier, who was a pork-butcher, had used it as a slaughter-house for slaughtering his hogs, and the present occupier, who was a butcher, used it as a slaughter-house for slaughtering oxen. The yard in question, along which the right of way to these premises was claimed, was a narrow passage, bounded by a row of houses on each side, the doors of which opened into it: when a cart and horse was driven through it, the foot-passengers could not pass the carriage, but were compelled, on account of the narrowness, to retreat into the houses; and they would be exposed to considerable danger if they were to meet horned cattle driven through it. It was in evidence that the preceding occupier had been accustomed to drive fat hogs that way to his slaughter-house; and that the plaintiff had been accustomed to drive a cart, the only carriage which he possessed, usually drawn by a horse, but in one or two instances by an ox, along this passage to his barn, where he kept his cart; there was then no other way to it. He had lately begun to drive fat oxen that way to the premises for the purpose of killing them there; but there was no evidence of any other user than this of the way for cattle. No deed of grant was produced. The defendant produced no evidence that he had ever interrupted the occupiers of the plaintiff's premises in driving cattle there, nor that they had been usually possessed of horned cattle which had not been driven that way; he admitted that there was suffi-

Williams v. Safford, 7 Barb. 309). In *Selby v. Nettlefold* there was a defined way. The law has been held the same in the United States. *Farnum v. Platt*, 8 Pick. 389; *Leonard v. Leonard*, 2 All. 543; *Kent v. Judkins*, 53 Me. 160; but in none of these was the way defined, except by ordinary use. See *Haley v. Colcord*, 59 N. H. 7; and cf. *Holmes v. Seely*, 19 Wend. 507; *Hamilton v. White*, 5 N. Y. 9; *Rockland Water Co. v. Tillson*, 75 Me. 170.

cient evidence of a right of way for *all manner of carriages*. It did not appear at what period the houses adjoining the way had been built. *Best*, Serjt., for the plaintiff, contended that a way for all manner of carriages necessarily included a right of way for all manner of cattle; and therefore proved the prescription. *Mansfield*, C. J., told the jury, that inasmuch as this was a private, and not a public way, they were not to conclude that a man might not grant a right of way to pass with horses and carts, and yet preclude the grantee from passing with all manner of cattle; and the degree of inconvenience which would attend the larger grant in this case, furnished an argument against the probability of it. He directed them, therefore, to say whether there was sufficient evidence of a right of way to drive cattle loose, or whether they would consider the grant or prescription as only co-extensive with the use that had been made of it. The jury found a verdict for the defendant.

Best, Serjt., having in Michaelmas Term last obtained a rule *nisi* for a new trial,

Shepherd, Serjt., on a former day in this term, showed cause.

Best, contra.

MANSFIELD, C. J., having adverted to the facts of the case, observed that in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the presumption would be for cattle as well as carriages, otherwise cattle could not be driven from one part of the kingdom to another. The authority cited from *Hawkins* only refers to Co. Lit., and the passage in Co. Lit. does not prove that Lord Coke was of opinion that in the case of a private way, which must originate in a grant, of which, the grant itself being lost, usage alone indicates the extent, evidence of a limited user could not be received to restrict the usual import of the grant. The general description given by Lord Coke does not seem to touch the question. He refers to *Bracton*, lib. 4, fol. 232, who only says, "there are *iter*, *actus*, and *via*;" but says not a word to explain the meaning of either, or the difference between them. Nor can I find in any of the books, nor even in any *nisi prius* case, any decision that throws light upon the subject. A parson has the *via* or *aditus* over a farm with carts to bring home his tithe; but he can use it for no other purpose. I have always considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cart-way. Consequently, although in certain cases a general way for the carriages may be good evidence from which a jury may infer a right of this kind, yet it is only evidence; and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial, as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in London should let a part of his own stable with a right of carriage-way

to it, which could be used with very little, if any, inconvenience to himself; yet there it would be a monstrous inference to conclude that if a butcher could establish a slaughter-house at the inner end of the mews without being indictable for a nuisance, he might therefore drive horned cattle to it, which would be an intolerable annoyance to the grantor. So cases may exist of a grant of land, where, from the nature of the premises, permission must be given to drive a cart to bring corn or the like, and that right might be exercised without any inconvenience to the grantor; but it does not follow that cattle may be driven there. The inconvenience in this case is a strong argument against the probability of the larger grant. The defendant was the proprietor of all these houses. My Brother Chambre mentioned the case of a public way, restricted to carriages only, in which some public notice was affixed to caution the public that there was no drift-way, and thought that the absence of such notice in this case was an argument against the probability of the restricted grant. This notice might be requisite in a public way, but in a private way, out of which cattle were excepted, the grantor might reasonably think it unnecessary to give his grantee notice of that, of which he must already be conscious; he might justly suppose that the grantee, knowing the nature of his right, would not attempt to use the way otherwise than according to his grant. I can find no case in which it has been decided that a carriage-way necessarily implies a drift-way, though it appears sometimes to have been taken for granted. I speak with doubt, because my Brother Chambre is of a different opinion; but I incline to hold that the verdict ought not to be disturbed.

HEATH, J. This is a prescription for a way for cattle, and a carriage-way is proved. A carriage-way will comprehend a horse-way, but not a drift-way. All prescriptions are *stricti juris*. Some prescriptions are for a way to market, others for a way to church, and in the ancient entries, both in Rastal and Clift, the pleadings are very particular in stating their claims. In Rastal, tit. *Quod permittat*, the distinction is clearly seen. Sometimes there is a carriage-way qualified. One claim is remarkable, *fugare quadraginta averia*. The usage then in this case is evidence of a very different grant from that which is claimed, namely, to drive fat oxen, — animals dangerous in their nature, and which there might be very good reason to except out of a grant of a way through a closely inhabited neighborhood. The jury having heard the evidence, and formed their opinion upon it, I am not prepared to say that the verdict shall not stand.

LAWRENCE, J. I should have been as well satisfied if the verdict had been the other way, but as the jury have decided upon the evidence, I am unwilling to disturb their verdict. This is the case of a prescriptive private way, which presumes a grant: the question then is, What was the grant in this case? That is to be collected from the use; for it is to be presumed that the use has been according to the grant. A grant of a carriage-way has not always been taken to include a drift-

way. In the entries are cases of prescription, not for carriages only, but for cattle also. Co. Ent. 5, 6. *Quod permittat ad carriandum et recarriandum blada, fenum, et fenum, ac omnia alia necessaria sua, cum carris et carectis suis, et ad fugandum omnia et omnimoda averia sua.* The person who drew that entry certainly did not conclude that a carriage-way included a drift-way for cattle. The use proved here, is of a carriage-way: the grant is not shown, and the extent of it can only be known from the use. If the use had been confined to a carriage-way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle; for till they were driven there, no opposition could be made, nor the limitation of the right shown; but pigs have been driven that way, and stress is laid upon this circumstance. That then may be good proof of a right to drive pigs that way; but the user of the way for pigs is not proof of a right of way for oxen. The grantor might well consider what animals it was proper to admit, and what not. The place is very narrow, and full of inhabitants. There is no danger from pigs, and carriages always have some one to conduct them. Cattle may do harm, and passengers cannot always get out of their way; but if the cattle are driven forward, serious injury may be done. The nature of the place, therefore, may probably have suggested a limitation of the grant.

CHAMBER, J. I think there ought to be a new trial; for all the evidence was on one side, and the verdict was against the evidence. I never thought that a carriage-way necessarily included a drift-way; but I think it is *prima facie* evidence, and strong presumptive evidence, of the grant of a drift-way. Undoubtedly a person may restrict his grant as he pleases, and when he has so limited it, the pleadings must be adapted to the particular grant, — which accounts for the variety in the entries. But it rests with the grantor to prove the restriction of the grant, otherwise it must be intended to be of the usual extent. This inconvenience indeed may occur from such a determination, that if the evidence be lost, the grantor may lose the benefit of his restriction, but he may and ought to preserve the evidence of the restriction; and the inconvenience would be of small extent; for I believe the cases are very few where a carriage-way has not been accompanied with this right: there seems to be almost a necessity for including it. The grantee may send back his horses without his carriage. He may draw his carriage with oxen; and the oxen, as well as the horses, must be driven back loose to pasture. There is strong presumptive evidence then of a drift-way. If the burden of the proof lies on the tertenant, it certainly is possible that he may lose the right of restraining the way; but for one case where the evidence has been lost, and would be supplied by this decision, there will be a thousand cases where a restriction will be created that did not exist in the original grant. I fear these rights of way will be very much narrowed, if they are to be confined to such actual use of them as can be proved. The manner of using a way may vary from time to time. I think the proof of driving

hogs is an important circumstance, and very strong evidence of a grant of way for cattle. According to the doctrine contended for, it would be necessary to drive every species of cattle in order to preserve the right of passing with that species. If a man had a little field where cows had not usually been pastured, it would be monstrous that he therefore should not drive his cow to it. Suppose any new species of cattle is introduced into the country, shall the grantees of private ways have no passage for them to their lands? Is it to be contended, for instance, that no ancient private way in the kingdom can be used for Spanish sheep? Much of the argument has been built upon these being horned cattle. Many breeds of kine have no horns: may the grantee drive those? As to the argument that the inconvenience of such an use amounts to a nuisance, nothing of that sort appears. The grantee has constantly driven all the carriages and all the cattle that he had. This is a claim by prescription, which imports great antiquity; and it does not appear how wide the way was at the time of the original grant, and how much the houses have encroached on it long since: but those encroachments cannot deprive the grantee of his ancient right of way.

Rule discharged.

COWLING v. HIGGINSON.

EXCHEQUER. 1838.

[Reported 4 M. & W. 245.]

TRESPASS for breaking and entering a close, called the Birchin Acre, and with divers horses, and the wheels of divers carts, wagons, and other carriages, crushed and damaged the grass of the plaintiff, of great value, to wit, £5, there then also growing and being, and with the feet of the said horses, and with the wheels of the said carts, wagons, and other carriages, tore up, subverted, and damaged the earth and soil of the said close, &c.

Pleas, first, the general issue; secondly, that the defendant, from a period long before and at the said several times when, &c., in the said declaration mentioned, hath been, and then was and still is, in the lawful possession and the occupier of part of a certain close, called Little Marl Field, near to the said close in which, &c.; and he further saith, that on the north of the said close in which, &c., there was, and during all the time hereinafter mentioned hath been, and at the said several times when, &c., there was and still is, a certain common and public highway leading between a certain place, to wit, Leigh, and a certain other place, to wit, Tildesley, and from each of those places to the other of them, in the county aforesaid; and the defendant further saith, that he and all the occupiers of the said close in this plea first above mentioned, have actually as of right used and enjoyed, without inter-

ruption in respect of such occupation, for the full period of twenty years next preceding the commencement of this suit, and of right ought to have so used and enjoyed, and he the said defendant, being such occupier as aforesaid, 'at the several times when, &c., as of right used and enjoyed, and still of right ought to use and enjoy, the liberty, privilege, benefit, and easement, as often as he or they might have occasion, to go, return, pass, and repass on foot, and with horses, carts, wagons, and carriages, from the said close first above mentioned to the said highway between Leigh and Tildesley aforesaid and back again, of going and to go from and out of the said close first above mentioned, and to pass and repass on foot, and with horses, carts, wagons, and carriages, from the said close into and along a certain way leading from the said close first above mentioned to the said close in which, &c., and from thence unto, into, by, through, over, along, and across the said close in which, &c., unto and into a certain other way leading from the said close in which, &c., to the said highway so on the north side of the said close in which, &c., as aforesaid, and so back again from the said highway into the said last-mentioned way, and from thence, unto, into, by, through, over, along, and across the said close in which, &c., and thence into the said first-mentioned way unto and into the said close first above mentioned, at all reasonable times of the year at his and their free will and pleasure: wherefore the defendants, at the said several times when, &c., the same then being reasonable times for that purpose, having occasion to use the way in this plea mentioned, then went, passed, and repassed on foot, and with the said horses, and with the said carts, wagons, and other carriages, from and out of the said close first above mentioned, into the said first-mentioned way, and thence out, into, by, through, over, along, and across the said close in which, &c., into the said other way as aforesaid, and thence unto and into the said highway so on the north side of the said close in which, &c., and so back again from the said highway into the said other way above mentioned and thence unto, into, by, through, over, along, and across the said close in which, &c., and thence into the said first mentioned way, unto and into the said close first above mentioned, using the said way there for the purpose and on the occasions aforesaid, as he lawfully might for the cause aforesaid, and in so doing the said defendant, with the said horses, and with the wheels of the said carts, wagons, and other carriages, unavoidably a little crushed and damaged the said grass of the plaintiff then growing and being in and upon the said close in which, &c., and with the feet of the said horses, and with the wheels of the said carts, wagons, and other carriages, a little tore up, subverted, and damaged the said earth and soil of the said close, doing no unnecessary damage to the plaintiff or the occupiers aforesaid, which are the said several trespasses in the declaration above mentioned, and whereof the plaintiff hath above thereof complained against him.

The third plea was similar, only stating the user for forty years instead of twenty.

The replication traversed both these pleas.

At the trial before *Coleridge, J.*, at the last Spring Assizes at Liverpool, it was admitted that there was a right of way for farming purposes over the *locus in quo*, to a farm, of one of the fields of which, called the Little Marl Field, the defendant was the occupier; but the plaintiff's counsel contended that there was no right of carting coals, which was the purpose for which the defendant had used the road; and it was proved by the plaintiff that no coals had been raised under that farm for the last 70 years; that about 70 years ago there had been coals raised there, but that they were carted from the pit along a different road; that Tildesley, to which the road led, was then a very small village, consisting of merely a few houses; that there were then other coal-pits nearer than those on the defendant's farm; and that there was a gate across this road, the key of which was kept by a tenant of the plaintiff's ancestor. The defendant's counsel then objected, first, that the issue was, whether there was a right of way for horses, carts, and carriages; and that since it was admitted that such right existed, the verdict ought to be for the defendant; and that if the plaintiff relied on the defendant's using the road for mining purposes, and that he had no such right, he ought to have new assigned; and secondly, that a right of road for farming purposes, and with horses, carts, and carriages, proved a right for all purposes. The learned judge, after consulting *Patteson, J.*, decided both points in favor of the plaintiff; and the defendant's counsel not claiming to have any question left to the jury, the learned judge directed them to find a verdict for the plaintiff, giving leave to the defendant to move to enter a verdict, if the court should be of a contrary opinion on either of the points taken. *Alexander* having, in Easter Term last, obtained a rule accordingly,

Cresswell, Starkie, and Wortley, now showed cause.

Alexander and *Wightman*, in support of the rule.

LORD ABINGER, C. B. I do not give any opinion upon the effect of the evidence; but I should certainly say that it is not a necessary inference of law, that a way for agricultural purposes is a way for all purposes, but that it is a question for the jury in each particular case, to be determined upon the various facts established in each case. If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shows a user for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed. I wish to say nothing as to the inference to be drawn by the jury in this particular case. The question is entirely for them to determine on the facts submitted to them. I think there ought to be a new trial on payment of costs.

PARKER, B. I am clearly of opinion that the defendant is not entitled to succeed on the question as to the new assignment. [He then stated the plea.] To make out this plea, it is necessary to show an enjoyment of the way generally *as of right*, for the period during which the plea states it to have been used; he must have used it for all purposes

as of *right*; and such user, for all purposes for which it was wanted, would be evidence to go to the jury of a general right. Under a plea of prescription of a way, it was necessary to show a user of it for all purposes time out of mind, according to the usual terms in which such a plea is pleaded. If it is shown that the defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to show that they had a general right to use it for all purposes, and from which a jury might infer a general right. In this particular case, I think the user is evidence to go to the jury that the defendant had a right to a way for all purposes for twenty years. As to the *effect* of such evidence, it is unnecessary to offer any opinion. If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all. You must generalize to some extent; and whether in the present case to the extent of establishing a right for agricultural purposes only, is a question for the jury.

*Rule absolute for a new trial, on payment of costs.*¹

¹ "If the facts in *Cowling v. Higginson* are looked at, it will be found that the mines had been opened, and therefore, though they had not been worked for seventy years, it was a property with existing mines in it. The way, it is true, had not been used for those mines, but as the property was a property within which there were opened mines, it might fairly be inferred that the right extended to using the road for the purposes of the mines, the working them being a reasonable use of the land in the condition in which it was." MELLISH, L. J., in *Wimbledon Conservators v. Dixon*, 1 Ch. D. 362, 371. See *Dare v. Heathcote*, 25 L. J. Ex. 245; *Sloan v. Holliday*, 30 L. T. (N. S.) 767; *Hart v. Chalker*, 5 Conn. 311; *Parks v. Bishop*, 120 Mass. 340.

"A way imports of necessity a right of passing along a particular route between certain termini. Passing over a tract of land in various directions at different times from year to year not only has no tendency to establish a right over a particular route, but would seem to be inconsistent with such a claim. To establish a way by prescription, the use must be, not only open, adverse, uninterrupted, peaceable, continuous, and under a claim of right, but must be confined substantially to the same route, and to substantially the same purpose for which the way was designed originally, unless the way is one for all purposes.

"The purpose for which a way was designed may, and perhaps must, be shown by the use made of it.

"In the present case, if the defendant and his predecessors in title or occupancy of the King farm used one of the ways for the purpose of carting ice, for instance, from the pond, and another for the purpose of carting logs, lumber, sand, and wood from other premises belonging to that farm, and such use was of the character described above, and was continued for twenty years and upwards, then rights of way for such purposes appurtenant to the King farm would be acquired over the routes so used. But if, in carting ice from the pond, or wood, sand, lumber, or logs from the other premises, no particular route was used by the defendant and his predecessors, but the locus was traversed in such directions as at the time seemed convenient, so that the use was not confined in the main to substantially the same route or routes, but extended as the surface permitted over a considerable part of the entire tract, then no right of way would be acquired." MORRIS, J., in *Hoyt v. Kennedy*, 170 Mass. 54, 56 (1897).

COLCHESTER v. ROBERTS.

EXCHEQUER. 1839.

[Reported 4 M. & W. 769.]

TRESPASS for breaking and entering a certain close of the plaintiff called "The Reddings," situate, &c., and breaking, &c., a gate then standing and being in the said close, and the locks, staples, and hinges with which the same was fastened, and with feet in walking, and also with the wheels of divers carts, wagons, and other carriages, tearing up and subverting the earth and soil of the said close, &c., &c., and then hauling over the said close large quantities, to wit, 100 tons of lime and 100 tons of building materials.

Pleas, first, Not guilty. Secondly, that the defendant, long before and at the several times when, &c., in the said declaration mentioned, was the lawful occupier of a messuage and divers (to wit) three closes of land with the appurtenances respectively, situate in the county aforesaid, and near to the said close of the plaintiff in the declaration mentioned, in which, &c.; and the defendant further says, that he the defendant, and all the occupiers for the time being of the said messuage and closes of the defendant have, and each of them hath had, used, and enjoyed as of right, and have and each of them hath been accustomed to have, use, and enjoy as of right, for and during the full period of twenty years next before the commencement of this suit, a certain way for himself and themselves, and his and their servants, to go, pass, and repass on foot and with horses, mares, geldings, carts, wagons, and other carriages, from and out of a certain common highway in the county aforesaid, towards, unto, into, through, over, and along the said close of the plaintiff in the declaration mentioned, and in which, &c., and from and out of the same towards, unto, and into the said messuage and closes of the defendant, and so from thence back again towards, unto, into, through, over, and along the said close of the plaintiff in the declaration mentioned, and in which, &c., and from and out of the same towards, unto, and into the said common highway, at all times of the year, at the free will and pleasure of the defendant and the said other occupiers for the time being of the said messuage and closes of the defendant, as to the said messuages and closes of the defendant belonging and appertaining: Wherefore the defendant, at the said several times when, &c., being the lawful occupier of his said messuage and closes, and having occasion to use the said way, went, passed, and repassed on foot and with his horses, mares, geldings, carts, wagons, and other carriages in the declaration mentioned, the said carts, wagons, and other carriages then being loaded with the stone, lime, and building materials in the declaration mentioned, in, by, through, and along the said way from the said common highway towards, unto, into, through, over, and

along the said close of the plaintiff in the declaration mentioned, and in which, &c., towards, into, and unto the said messuage and closes of the defendant, and so from thence back again, in, by, through, and along the said way, towards, unto, and into the said common highway, as he lawfully might for the cause aforesaid; and in so doing, &c. [justifying the trespasses]. Thirdly, leave and license.

The replication to the 2d plea was, that the defendant, and all the occupiers for the time being of the said messuages and closes of the defendant, have had, used, and enjoyed the said way in the 2d plea mentioned, for and during the said period therein also mentioned, by the *leave, license, and permission* of the plaintiff, to him and them for that purpose granted; which was denied in terms by the rejoinder.

To the 3d plea, the plaintiff replied *de injuria*.

At the trial before *Lord Abinger*, C. B., at the last Summer Assizes for the county of Gloucester, it appeared that the defendant, and the preceding occupiers of his house and lands, had an admitted right of way from thence over the *locus in quo* to the highway, and across the highway to a close called "Ruddocks;" and that for the last twenty years they had had a license from the plaintiff to use, whenever they pleased, a way from the defendant's house and lands, when they had not any intention of going to Ruddocks. The counsel for the defendant contended that the second issue was not supported by the evidence, and that the plaintiff ought to have new assigned. The learned judge directed the jury to find a verdict for the plaintiff on the first and second issues, subject to a motion to this court to enter a verdict for the defendant on the second issue. *Ludlow*, Serjt., in Michaelmas Term last, having obtained a rule accordingly,

Talfourd, Serjt., and *W. J. Alexander*, in Hilary Term, showed cause.

Ludlow, Serjt., and *Whateley*, contra.

The judgment of the court was now delivered by

PARKE, B. The plea to a declaration in trespass *qu. cl. fregit* in this case was, that the defendant and the occupiers of a house and land of the defendant's had for twenty years used and enjoyed, as of right, a certain way on foot and with horses, &c., from and out of a common highway, towards, unto, into, through, and over the plaintiff's close, to the defendant's house and lands and back, at all times of the year at their free will and pleasure. To this there is a replication which, in effect, admits that the defendant and the occupiers of his house and lands, had for twenty years used and enjoyed the way described in the plea as of right, in some sense, but avoids the plea, by stating that such enjoyment during that period was by the plaintiff's license; and this license was denied by the rejoinder.

On the trial, it appeared that the defendant, and the preceding occupiers of his house and lands, had an admitted right of way from thence, over the *locus in quo* to the highway, and across the highway to a close called "Ruddocks," and that, for the last twenty years, they had a

license from the plaintiff to use, whenever they pleased, a way from the defendant's house and lands over the *locus in quo* to the highway and back, when they had not any intention of going to Ruddocks; and the point to be decided, which was reserved on the trial, is, whether this proof supports the replication; and upon consideration, we think it does not.

The difficulty of this case (and it is one of considerable nicety) arises from the fact, that one terminus of the way is the high road. If it had been to and from Black Acre, a close of the defendant's in the same situation as the highway, the case would have been plain; for a right to go, not to or from that close as a terminus, but over it to or from the Ruddocks beyond, would have been a different right. One proof of this is, that if the right of way to Black Acre had been pleaded, it would have been a good replication that the defendant went to or came from Ruddocks beyond, when he committed the trespass, for that would not be an exercise of the *same right*.

A license, therefore, to use a way to or from Black Acre, would not have included a permission to go to or come from beyond it; and the allegation in the replication that his right of way to the close as a terminus was by the plaintiff's license, would have been proved. But the terminus here is not a close, but a highway; and whenever a person gets to the highway, he has a right to go on to any place to which it leads, and *vice versa*. A right of way, therefore, to or from a highway, is in effect a right to go to it, and to each and every place *beyond, to which it leads*. The right of way across the highway to "Ruddocks" is included in the *general* right to the highway, and from thence to all other places. If we apply the same test to this case, as to the supposed one of a right of way to a close, instead of a highway, we shall find that it is so; for to a plea, stating a right of way to the highway, it would not be a good replication to say "that the defendant went to the highway and *thence* to Ruddocks;" it would not be an exercise of a *different* right, but of a part of the *same* general right, and the defendant would not be a trespasser by going to the highway for the purpose of going to Ruddocks, any more than he would be if he went from the highway to any other place. And if a right alleged in similar terms were traversed, the traverse would include the right of going to the highway and thence to Ruddocks.

The issue, therefore, which the plaintiff undertakes to maintain in this case, is, that the defendant enjoyed the right to go to or from the highway, and every place beyond to which it leads, to which the defendant might choose to go, by the plaintiff's license; but such a license was not proved. For the proof was of an enjoyment by license to go to the highway and thence to every other place except Ruddocks, to which place the defendant could go of his own right. The issue, therefore, was not proved; and if the verdict were to stand, the defendant would lose his admitted present limited right, for the verdict would be conclusive evidence that he enjoyed it *by license only*.

The case is, however, very fit for an amendment of the replication, on payment of costs of the trial; by restricting the allegation of the license to the exercise of the road for all other purposes than for going to Ruddocks.

Rule accordingly.

ALLAN v. GOMME.

KING'S BENCH. 1840.

[Reported 11 A. & E. 750.]

THIS cause was tried before *Littledale*, J., at the Buckinghamshire Summer Assizes, 1838, when a verdict was found for the plaintiff, leave being reserved to move to enter a nonsuit. In Michaelmas Term, 1838, *Storks*, Serjt., obtained a rule *nisi* for a nonsuit, or for arresting the judgment.

In Hilary Term last,¹ *Kelly* and *Gunning* showed cause, and *Storks*, Serjt., and *Byles* supported the rule.

Cur. adv. vult.

LORD DENMAN, C. J., in this term delivered the judgment of the court. The nature of the case, and the arguments used, will fully appear by the judgment.

This was an action of trespass for breaking and entering the plaintiff's close, being part of a certain yard at Chesham, in the county of Buckingham, which is particularly described by the abutments, and committing trespasses there. The defendants pleaded, 1. Not guilty. 2. That the close was not the close of the plaintiff. 3. That, before the times when, &c., to wit on the 5th March, 1813, one James Millar, and two other persons, as assignees of Samuel Porter, a bankrupt, were seised in fee of certain messuages, hereditaments, and premises, comprising, as well the hereditaments and premises thereafter mentioned to have been appointed and conveyed to the plaintiff, and of which the close in which &c. is parcel, as the hereditaments and premises thereafter mentioned to have been bargained and sold to the defendant Gomme; and that the said assignees and other persons, by lease and release of the 5th and 6th of March, 1813, conveyed the whole of the premises in this plea mentioned to one Browne and his heirs;² and, by indenture of appointment of October 26, 1826, between Browne, the plaintiff, and other persons, Browne directed, limited, and appointed to the plaintiff a certain messuage, hereditaments, and premises, being part and parcel of the messuage, hereditaments, and premises herein-

¹ Before LORD DENMAN, C. J., LITLEDALE and COLERIDGE, JJ. WILLIAMS, J. was at Monmouth, on the special commission.

² The *habendum* was to the use of such persons as Browne should appoint by deed, writing, or will; and, in default, &c., to the use of one Woodham for Browne's life, in trust for Browne and his assigns, remainder to the use of Browne in fee. — REP.

before mentioned to have been conveyed to Browne, and comprising, among other things, the close in which &c.; reserving, nevertheless, to and for the said Browne, his heirs and assigns, and his and their tenants, &c., occupiers for the time being of a certain messuage or tenement then in the occupation of one Thomas Creed, and thereafter mentioned to be bargained and sold to the defendant Gomme (the said last-mentioned messuage or tenement being other parcel of the said messuages, hereditaments, and premises mentioned to have been bargained and sold to the said Browne), *a right of way and passage over the said close in which &c., to the stable and loft over the same, and the space or opening under the said loft and then used as a wood-house*, and to the chaise-house then standing and being on the side of the said close in which &c. (the said stable, loft, and chaise-house then also being in the occupation of the said Thomas Creed, and being other parcel of the premises thereafter mentioned to have been bargained and sold to the defendant Gomme, and also of the hereditaments and premises thereinbefore mentioned to have been bargained and sold to the said Browne); and also *the use of the said close in which, &c., in common with the plaintiff, his appointees, heirs, and assigns, and his and their tenants for the time being*; it being expressed in the said last-mentioned indenture to be the intent and meaning of the parties thereto that the whole of the said yard, of which the said close in which &c. was and is parcel (except a certain part thereof other and different from the said close in which &c.), should lie open and undivided as the same then was, without any other building to be erected thereon, and that the same should be used in common by the occupiers, as well of the said messuage or tenement appointed by the said last-mentioned indenture to the plaintiff, as of the said other messuage or tenement hereinafter mentioned to have been bargained and sold to the defendant Gomme, in the same manner as the tenants thereof had been accustomed theretofore to use the same. By virtue of which said indenture of appointment the plaintiff became and was and still is seised of and in the said close in which &c., subject to such right of way and to such use of the said close in which &c., as was and is reserved by the said last-mentioned indenture of appointment. The plea then stated that, before and at the time of the making of the said indenture of appointment, and thence until and at the time of the making of the indenture hereinafter next mentioned, the tenants and occupiers of the said messuage and of the said stable, loft, and chaise-house hereinafter mentioned to have been bargained and sold to the defendant Gomme, but at the time of the making of the said indenture of appointment in the occupation of the said Thomas Creed, and also the tenants and occupiers of the said messuage or tenement so appointed to the plaintiff, had been used and accustomed to use the said closes in which &c.; and the said close in which &c. during all the time aforesaid was open and undivided, and was used in common by the respective tenants and occupiers of the said several messuages,

tenements, and premises for the purposes of passing and repassing in and along the same; and the said tenants and occupiers of the said messuage and premises hereinafter mentioned to have been bargained and sold to the defendant Gomme, during all that time, had been used and accustomed to use the said close in which &c., for themselves and their servants, for the passing and repassing in, along, and across the same every day and at all times of the day, at their free will and pleasure, for the necessary use, occupation, and enjoyment of the said messuage and premises hereinafter mentioned to have been conveyed to the defendant Gomme. The plea then stated several conveyances of the premises not conveyed to the plaintiff by the deed of 26th of October, 1826, and to which premises so not conveyed to the plaintiff the right of way and the use of the close so before mentioned had been reserved to Browne and his heirs, and by which conveyances these premises became vested in Joseph Birch, in trust for the defendant Gomme; and the defendant Gomme, by the license and permission of the said Birch, became and was and still is in the occupation of the said last-mentioned messuage and premises, with the appurtenances, as the tenant and occupier thereof, and, as such tenant and occupier, then became and was entitled to have and use a way over the said close in which &c., to the said stable and loft and chaise-house standing and being on the side of the said close in which &c., in common with the plaintiff and his tenants for the time being of the said messuage and premises of the plaintiff. And the said defendant Gomme then became and was entitled to use the said close in which &c., in common with the said plaintiff, so being the occupier of the said messuage and premises of the plaintiff, in the same manner as the tenants of the said several messuages had been respectively accustomed to use and occupy the said close in which &c., at the time of making the said indenture so bearing date the 26th day of October, in the year of our Lord 1826, as aforesaid: Wherefore, the said defendant Gomme so being such occupier, and being so entitled as aforesaid, at the said several times when &c., and having occasion to use the said way, and also to use the said close in which &c., for himself and his servants, for the purpose of passing and repassing in, along, and across the same for the necessary use, occupation, and enjoyment of the said messuage and premises so in the occupation of the said Gomme, he the said Gomme in his own right, and the said Joseph Darvell as his servant and by his command, at the said several times when &c., did pass and repass from the said messuage so in the occupation of the said defendant Gomme, in, through, over, and along the said close in which &c., unto and into the said stable, loft, and chaise-house, and so from thence back again unto and into the said close in which, &c., and from thence unto and into the said last-mentioned messuage, using the said way there for the purpose and on the occasion last aforesaid; and did also use the said close in which &c. for the purpose of passing and repassing in, along, and across the same for the necessary use, occupation, and enjoyment of

the said messuage and premises so in the occupation of the said defendant Gomme, as the tenants of the said last-mentioned messuage, before and at the time of the making of the said indenture so bearing date the 26th day of October, 1826, had been accustomed to use the same, as they the defendants lawfully might for the cause aforesaid.

And the plaintiff joined issue on the first and second pleas of the defendants.

To the plea of the defendants by them lastly above pleaded, the plaintiff said that he brought this action and declared therein, not for the said supposed trespasses in the said last plea mentioned, but for the trespasses thereafter mentioned. And the plaintiff said that, after the said conveyance to the said plaintiff as aforesaid, and after the defendant Gomme became such occupier as aforesaid, and before any of the said times when &c., to wit on the 1st February, 1833, the said defendant Gomme converted the said loft, and the space thereunder before then used as a wood-house as aforesaid, into a cottage; and, before and at the said times when &c., the said loft and space were kept so converted into such cottage; and, before and at the said times when &c., the said other defendant Darvell by the sufferance and permission of the said defendant Gomme, used and occupied the said cottage, and lived and resided therein, and, during all those times, the defendants ceased to use the same as a loft or wood-house as aforesaid. And the said plaintiff further said that the defendants broke and entered the said close in which &c. on other and different occasions than those in the last plea mentioned, and for other and different purposes than in that plea mentioned, to wit by then and there passing and repassing across the said close in which &c., from and to the said cottage so occupied by the defendant Darvell as aforesaid, and then and there passed to and from the said cottage, across the said close in which &c., unto and into the said other part of the said common yard in the said last plea mentioned, and thence unto and into a certain common highway there, and so from thence back again unto and into the said other part of the said common yard, and over the said close in which &c., unto and into the said cottage, for the purposes of the occupation of the same as aforesaid, and not for the said purposes in the said reservation in the said last plea mentioned. And the plaintiff said that the defendants, on the said days and times when &c., with force and arms &c., broke and entered the said close in which &c., and with feet in walking trod down, trampled upon, consumed and spoiled the grass and herbage of the plaintiff there then growing, on other and different occasions, and for other and different purposes, than in the said last plea mentioned, in manner and form as he the said plaintiff hath above thereof complained against the defendants.

And the defendants, as to the said several alleged trespasses above newly assigned, said that the said passing and repassing across the said close in which, &c., in the said new assignment mentioned, was done and committed by the defendants for the purposes mentioned in

the said reservation in the said indenture bearing date the 26th day of October in the year of our Lord 1826, and in the manner and as the tenants of the said messuage and premises in the occupation of the said defendant Gomme, before and at the time of the making of the said last mentioned indenture, had been accustomed to use the said close in which, &c., without this, that the defendants, or either of them, committed the said several trespasses above newly assigned, or any or either of them, or any part thereof, in manner and form as the plaintiff hath above thereof, by his said new assignment, complained against them; and of this the defendants put themselves upon the country &c. Upon which the plaintiff joined issue.

This cause was tried before our brother *Littledale* at Buckingham at the Summer Assizes in 1838.

It was proved that the defendant Gomme converted the loft and the space thereunder, before then used as a wood-house, into a cottage, and that the other defendant, Darvell, by the sufferance and permission of Gomme, used and occupied the cottage, and that the defendants passed and repassed across the close in which &c. to and from the cottage as stated in the new assignment.

The jury found a verdict for the plaintiff, with 1s. damages.

The judge gave my brother *Storks* leave to move to enter a nonsuit, which he did, and also moved in arrest of judgment.

The question is, whether, under the terms of the deed of 26th October, 1826, the defendants were justified in going backwards and forwards to and from the cottage which was built upon the site of the space or opening under the loft and then used as a wood-house, mentioned in that deed, there being no cottage in existence there at the time of the execution of the deed.

The defendants claimed the right on two grounds.

First, that there is a right of way reserved to Browne, and those claiming under him and the future owners, to and from the space or opening under the loft then used as a wood-house; and that, such right being reserved in general terms, and without any restriction whatever, these future owners and tenants may use the way, not only to the mere site of the space or opening used as a wood-house, but also to whatever is built upon that site. The second ground of claim is, that, by the terms of the deed, Browne and those claiming under him had a right to use the yard in common with the plaintiff and his tenants, and in the same manner as the tenants had been accustomed theretofore to use the same; and that they had a right to the use of the yard under that clause of the deed without any reference to the reservation of the way.

We will give our opinion on the latter ground of claim first, as there is less difficulty in that than on the question on the reservation of the way.

The right to use the yard in question in common with the plaintiff and his tenants is confined to the use of it as it was at the time of the execution of the deed. But, when there was no cottage built on the

site of the open space of ground used as a wood-house, the use of the yard was very different from what it would be when a cottage was built upon it. For, when the cottage was built, a much greater number of persons, perhaps some with more horses and carts, would come upon it, and be very likely to obstruct or put to inconvenience the plaintiff and his tenants, and prevent them from having the same enjoyment of it as before. And we think that, as the use of the yard by the defendant and his tenants since building the cottage is greater and more extensive, and may be more inconvenient to the plaintiff and his tenants, than it was before the cottage was built, that clause of the deed will not give the right to the defendants which they contend for.

Next, as to the reservation of the way.

It may be a question, in the first place, whether this is a way to a wood-house by the description of a wood-house, or whether it is a way, to the open space of ground, and the saying "now used as a wood-house," was merely to ascertain what piece of open ground was meant, and where it was. And it was contended by the defendants that, whatever might be the construction of the deed, if it was a way to a wood-house specifically, in which case it might be said that the way was limited to a wood-house merely as such, and that therefore, if the wood-house was converted into a cottage, the way was gone, yet that if the wood-house was merely mentioned to ascertain and point out the locality of the open space of ground, it could not be intended that the construction of the deed could be to confine the way to a mere piece of open ground, and that it must be intended that the way was meant to apply to a right to go to the ground, whatever was the use to which the ground was put, whether by building or by a deposit of loose articles, such as wood, coals, or any movable property.

We think, as between these two different meanings, considered as with reference to this property, the way is to be taken to be to an open piece of ground generally; and that the words "now used as a wood-house" are to be taken as merely ascertaining the place where the piece of open ground was, and which, of course, must be particularly ascertained, either by name or abutments, or by the use which was made of it.

There is no direct authority to show whether, if the use of a place to and from which a way is by express words reserved or granted, be completely changed, the way can still be continued to be used.

It has been held that, if a man has a right of way to a close called A., he cannot justify using the way to go to A. and from thence to another close of his own adjoining to A. *Vide* 1 Rol. Abr. 391;¹ *Hovell v. King*, 1 Mod. 190;² *Lawton v. Ward*, 1 Ld. Raym. 75; s. c.

¹ *Chimin Private (A)*, pl. 3. See *Ellison v. Isles*, 11 A. & E. 678. Com. Dig. *Chimin* (D 5), was cited against the rule. See *Heynsworth v. Bird*, Trials per Pais, 529 (8th ed.).—RHP.

² Bull. N. P. 74, and *Senhouse v. Christian*, 1 T. R. 580, were cited against the rule.—RHP.

1 Lutw. 111. That, however, does not decide the question. The case of *Ballard v. Dyson*, 1 Taunt. 279, was a way claimed by prescription for cattle; the evidence was of a carriage way, and the question was, whether that proved a drift way for cattle. It was held by all the court that a carriage way did not necessarily prove a right of way for cattle, but it was evidence for the jury to consider along with other evidence. The case, however, was decided on the effect of the evidence as to the user, and whether the jury had come to a correct conclusion. In delivering the judgment of the court, Lord Chief Justice Mansfield, Mr. Justice Heath, and Mr. Justice Lawrence were of opinion that the extent of the usage of a way is evidence only of a right commensurable with the user. Mr. Justice Chambre, however, was of opinion that it was not so limited.

In *Cowling v. Higginson*, 4 M. & W. 245, the defendant pleaded, to an action of trespass, a right of way for horses, carts, wagons, and carriages. On the trial before Mr. Justice Coleridge, it was admitted that there was a right of way for farming purposes over the *locus in quo*; but the defendants wished to establish a right to cart coals. On a motion for a new trial Lord Abinger seemed to be of the same opinion that the three judges had expressed in *Ballard v. Dyson*, and did not agree with the opinion of Mr. Justice Chambre. Mr. Baron Parke, however, was of opinion, according to that of Mr. Justice Chambre, that, if a party has time out of mind used a way for all the purposes he wanted, it would seem to him to give him a general right. See p. 252.

In the case of *Jackson v. Stacey*, Holt's N. P. C. 455, Mr. Baron Wood held that the user of a way for agricultural purposes only was not sufficient to support a general right.

All these three cases, however, turned upon the evidence of usage, and were all cases for the jury upon the usage. The present case does not, however, depend upon the mode of using the way, but upon the legal effect of the reservation. Upon that we are of opinion that, under the terms of this deed, the defendant is not entitled to have the right of way claimed, but that he is to be confined to the use of the way to a place which should be in the same predicament as it was at the time of the making the deed. We do not mean to say that he could only use it to make a deposit of wood there, for we consider the words "now used as a wood-house" merely used for the ascertaining the locality and identity of the place called a space or opening under the loft; and we think he might have the benefit of the way to make a deposit of any articles, or use it in any way he pleased, provided it continued in the state of open ground. But we think he could only use it for purposes which were compatible with the ground being open, and that, if any buildings were erected upon it, it was no longer to be considered as open for the purpose of this deed.

Suppose that this piece of ground, instead of being a small quantity, had been a field of many acres, and that Browne had sold off the part above mentioned to the plaintiff, reserving to himself this right of way

to the land, calling it a field then in pasture, or in corn, and had subsequently filled the land with small cottages, or had built a factory, or established gas works: it surely never could be contended that it was the meaning of either of the parties to the deed that there should be a right of way over the yard to those buildings. The supposed intention of the parties cannot, indeed, be considered; and it can only be determined by the instrument itself what their intention was. In *Luttrell's Case*, 4 Rep. 86 a, the plaintiff declared that he was seised in fee of two old and ruinous fulling mills, and that, from time immemorial, a great part of the water of a certain rivulet ran from a certain place to the said mills; and that he afterwards pulled down those fulling mills, and in their place built two mills to grind corn; and that the water ran to the new mills till such a time; and the defendants diverted the water from his corn mills. The defendants pleaded Not guilty, and the plaintiff had judgment. Then the defendants brought a writ of error in the Exchequer Chamber; and it was objected that the plaintiff, by pulling down the old fulling mills and building new mills of another nature, had destroyed the prescription, and could not have the benefit of the water for his grist mills. But the judgment of the court was affirmed; and the court held that the prescription did extend to the new grist mills, for the mill is the substance, and the addition of grist or fulling is but to show the nature of the mill. And, therefore, if the plaintiff had prescribed to have the watercourse to his mill generally, as he well might, then the case would be without question but that he might alter the mill into what nature of a mill he pleased, provided no prejudice should thereby arise either by diverting or stopping the water as it was before. And it should be intended that the grant to have the watercourse was before the building of the mills; for nobody will build a new mill before he is sure to have water; and then, the grant of the watercourse being generally to his mill, he may alter the quality of the mill at his pleasure, and the court said that, if a man has estovers, either by grant or prescription, to his house, although he alters the rooms and chambers so as to make a parlor where it was the hall, or the hall where the parlor was, and the like alteration of the qualities; and not of the house itself, and without making new chimneys, by which no prejudice arises to the owner of the wood, it is not any disturbance of the prescription; for then many prescriptions will be destroyed; and though he builds new chimneys, or makes a new addition to his old house, by that he shall not lose his prescription: but he cannot spend or employ any of his estovers in the new chimneys, or the part newly added; the same also of conduits and water pipes, and the like. So, if a man has an old window to his hall, and afterwards he converts the hall into a parlor or any other use, yet it is not lawful for his neighbor to stop it, for he shall prescribe to have the light in such a part of the house. And although in this case the plaintiff has made a question, forasmuch as he has not prescribed to have the watercourse to his mill generally, but particularly to his fulling mill, yet,

inasmuch as the mill was the substance, and the addition demonstrates only the quality, and the addition was not of the substance but only of the quality or name of the mill, without prejudice in the watercourse to the owner thereof, it was resolved that the prescription remained.

The court, therefore, appears to have put the case on whether the alteration of the thing, in respect of which the right was claimed, was of the substance and not merely of the quality of the thing. Now the alteration of a piece of vacant ground into a cottage is certainly an alteration of the substance, and not merely of the quality.

A great number of cases have occurred of late years, as to lights, where there has been an alteration in the building in respect of which the lights were claimed; and, in some of them, the question has been, whether the original right has not been altogether extinguished by the alteration. We do not think it necessary to advert to the particular circumstances of the cases; but in none of them was it contended that, if the substance of the thing in respect of which the right was claimed was altered so as to occasion any injury or prejudice to the person who supplied the easement, any additional right of easement could be acquired. We think therefore that the defendants had no right to use the way to the newly erected cottage, and that therefore there is no ground to enter a nonsuit.

As to the motion in arrest of judgment upon the new assignment, it is made upon the ground that the replication is no answer to the plea, and that the new assignment is only in respect of trespasses which on the record appear to be justified by the plea.

As to the replication being no answer to the plea, it is not in fact a replication properly so called, but it is a new assignment; and it begins with stating that the plaintiff brought his action, not for the trespasses mentioned in the plea, but for the trespasses thereafter mentioned; and then it goes on to enumerate other trespasses, and the circumstances under which they were committed. And we think that the plea, for the reasons we have before given, affords no answer to them, and that therefore there is no ground for arresting the judgment.

But besides, the merits of the cause being against the defendants on this point, the defendants could not, even in point of form, have the judgment arrested, as the record now stands; for at the end of the new assignment there is a general allegation, independent of the question about the way or the use of the yard, that the defendants committed the trespasses on other occasions, and for other purposes than those mentioned in the plea, to which no answer is given in any part of the record, except the traverse at the end of the plea to the new assignment, which is in effect only Not guilty.

The rule, therefore, for entering a nonsuit, and also for arresting the judgment, must be discharged.

*Rule discharged.*¹

¹ "In *Allan v. Gomme* a more strict rule was laid down than I should have been disposed to adopt; for it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of the

WILLIAMS v. JAMES.

COMMON PLEAS. 1867.

[Reported L. R. 2 C. P. 577.]

DECLARATION for trespass to land.

Fifth plea, that one Ann Morgan was owner in fee of certain land, and was entitled by immemorial user to a right of way over the plaintiff's land, on foot, and with wagons, carts, and horses, to a public highway from her said land, for the more convenient occupation thereof; that Ann Morgan demised this land with its appurtenances to one Jenkins; and that the alleged trespasses were the use of the right of way by the defendant, as the servant of Jenkins.

Issue and new assignment of excess in the user of the way.

At the trial before *Pigott*, B., at the Spring Assizes for Monmouthshire, the following facts were proved: Ann Morgan was owner in fee of a field called the Nine-acre field, and of two other fields adjoining, called Parrott's land. These three fields were in the occupation of R. Jenkins. There was from time immemorial a right of way on foot and for wagons, carts, and horses, from the Nine-acre field over the plaintiff's land to a public highway. There was no right of way over the plaintiff's land from Parrott's land. In the summer of 1866 Jenkins mowed the Nine-acre field and Parrott's land, and stacked all the hay upon the Nine-acre field. In September, 1866, Jenkins sold the hay to the defendant, who carted it over the plaintiff's land to the highway, which was the alleged trespass.

The jury found, first, that there was an immemorial right of way from the Nine-acre field to the highway; secondly, that the stacking of the hay was done honestly, and not to get the way further on; thirdly, that there was no excess in the user of the way by the defendant, apart from the question of defendant's right to cart the hay grown on Parrott's land over the plaintiff's land; fifthly, if Parrott's land hay could not be legally carried over the plaintiff's land, then damages 40s.

Pigott, B., directed a verdict for 40s. to be entered for the plaintiff, with leave to the defendant to move to enter the verdict for him.

making of the deed. No doubt, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered. . . . The case of *Allan v. Gomme*, 11 A. & E. 759, would probably authorize us to make this rule absolute. I confess, however, that I do not concur to the full extent of the doctrine there laid down, although that decision may be supported by the context, because it was a reservation of a right of way to that space only, which was then used as a wood-house, and was not like the case of a general grant of a way to Greenacre, which would mean for whatever purpose the field was used unless limited by the context." *Per PARKER*, B., in *Henning v. Burnet*, 8 Ex. 187, 192, 194.

See *Cannon v. Villars*, 8 Ch. D. 415; *Finch v. Great Western Ry. Co.*, 5 Ex. D. 254, *Bangs v. Parker*, 71 Me. 458; *Arnold v. Fee*, 148 N. Y. 214.

A rule having been obtained accordingly, *Huddleston*, Q. C., and *Jelf* (*J. O. Griffiths* with them), showed cause.

Gilmore Evans (*H. Matthews* with him), *contra*.

BOVILL, C. J. In all cases of this kind which depend upon user the right acquired must be measured by the extent of the enjoyment which is proved. When a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it any additional burden. It is also clear, according to the authorities, that where a person has a right of way over one piece of land to another piece of land, he can only use such right in order to reach the latter place. He cannot use it for the purpose of going elsewhere. In most cases of this sort the question has been whether there was a *bona fide* or a mere colorable use of the right of way. That was the question in *Skull v. Glenister*, 16 C. B. (N. S.) 81; 33 L. J. C. P. 185, and on which the case was ultimately decided. This question is excluded here by the finding of the jury.

With respect to the purposes for which the land was used, it is agreed on both sides that that question was raised and discussed at the trial; and the question whether there had been any excess in the user of the right of way, and also the question of the *bona fides* of Jenkins in stacking the hay, were left to the jury. The question, therefore, of what was the ordinary and reasonable use of the land, was practically left to the jury. They found that Jenkins acted honestly; and that is equivalent to finding that what had been done was done in the ordinary and reasonable use of the land to which the right of way was claimed, and in the ordinary and reasonable use of the right of way itself. It was for the plaintiff to show that there had been some excess of user on the part of the defendant, as by showing that the user of the right of way was only colorable, or that the Nine-acre field was used for purposes other than those included in the ordinary and reasonable use of the land. The finding of the jury excludes both these questions. In considering the matters submitted to them, the jury must have had to consider whether any additional burden had been cast upon the servient tenement. This was a necessary element for them to take into consideration in deciding whether there had been only an ordinary and reasonable use of the land in question. If no additional burden was cast upon the servient tenement, the jury might well find that there had been only the ordinary and reasonable use of the right of way. On the whole, the right of way being established, and the plaintiff not showing any excess in the user, I think the defendant is entitled to the verdict, and this rule must therefore be made absolute.

WILLES, J. I am of the same opinion. The distinction between a grant and prescription is obvious. In the case of proving a right by prescription, the user of the right is the only evidence. In the case of a

grant, the language of the instrument can be referred to, and it is of course for the court to construe that language; and in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against the grantor must be applied. Accordingly, in *South Metropolitan Railway Company v. Eden*, 16 C. B. 42, where a grant was produced without stating the object of the grant, it was the opinion of the judges that the grant was general, and that the way in that case might be used to any part of the land to which the way was granted.

I agree with the argument of Mr. Jelf that in cases like this, where a way has to be proved by user, you cannot extend the purposes for which the way may be used, or for which it might be reasonably inferred that parties would have intended it to be used. The land in this case was a field in the country, and apparently only used for rustic purposes. To be a legitimate user of the right of way, it must be used for the enjoyment of the Nine-acre field, and not colorably for other closes. I quite agree also with the argument that the right of way can only be used for the field in its ordinary use as a field. The right could not be used for a manufactory built upon the field. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place. A right of way by user was here proved, and I think the verdict of the jury excludes the excess of the user charged by the plaintiff. Honest user of the Nine-acre field must have been understood by the jury in the large sense of *bona fide* and reasonable, not a user in order to get an advantage to which the defendant was not entitled. The finding of the jury was, that the land was used honestly, and not in order to get a right of way further on. This is equivalent to finding that the stacking of the hay on the Nine-acre field was in the reasonable and ordinary use of it as a field; also that the carting was from the Nine-acre field, and not from Parrott's land. I think both these propositions are included in the finding. I think, therefore, that the rule must be made absolute. We could not refuse this without splitting straws on a subject which ought to be dealt with substantially. The case has been well argued on both sides, and Mr. Jelf has said all that could be said for the plaintiff.

MONTAGUE SMITH, J. The proposition contended for by Mr. Jelf in his able argument is, that this question is to be decided by us as a matter of law. I think that is not so. It is an admitted fact that some of the hay carried from the Nine-acre field was grown on Parrott's land, and the carrying away of this hay is the excess in the user of the right of way which is complained of. This alone, however, does not determine the question for the plaintiff. The question is for the jury, whether the stacking of the hay in question and the carrying of it away was in the ordinary and reasonable use of the Nine-acre field. The jury have found that there is an immemorial right of way over the plaintiff's land for carts, carriages, and horses, for the more convenient use and occupation of the Nine-acre field. Before the jury could decide whether

there had been any excess in the user of the right by the defendant they must have decided the extent of the right of way. The way here is claimed for the more convenient use of the Nine-acre field. The circumstances under which the hay was stacked, and the purpose and object of the defendant in carrying it away, are questions for the jury. As I read the finding of the jury, the stacking and the subsequent dealing with the hay were in the honest and reasonable use of the Nine-acre field. It was for the plaintiff to prove affirmatively upon this issue that there had been some excess of user by the defendant, but he has not done so; on the contrary, the jury have found against him. I think, therefore, the rule must be made absolute.

Rule absolute.

NEWCOMEN v. COULSON.

COURT OF APPEAL. 1877.

[*Reported 5 Ch. Div. 133.*]

IN 1760 an Act was passed for enclosing common lands at East Coatham in Yorkshire. By the award made in pursuance of this Act, being in form a deed to which all the allottees were parties, the commissioners allotted to Richard Agar a portion of the common, containing 7a. 0r. 4p., and directed that he should maintain the southern and eastern fences. The award conferred upon Agar and some other allottees a right of way in the following terms:—

“The said commissioners do hereby award, direct, and appoint that the said W. Turner, R. Agar, &c., and the owner and owners for the time being of the lands hereby to them respectively allotted, shall forever hereafter have and enjoy a way-right and liberty of passage for themselves and their respective tenants and farmers of the said lands and grounds, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle, as often as occasion shall require, from the common highway leading from Redcar aforesaid to the northeast end of the said R. Agar’s aforesaid allotment in the said East Stoney Butts, and from thence to the said old enclosures called West Dyke Closes, in, over, and through the east end or part of their said respective allotments in the said East Stoney Butts and Upper Half Acres to and from their said respective allotments without interruption, or paying any consideration for the same, doing as little damage to the soil or the corn, grass, or herbage as may be.”

The award also directed that in case the said allottees, or any of them, or any of the owners for the time being of their respective allotments, should “street out” the same way leading through their said respective allotments, the same should be made, and should forever re-

main, eleven yards broad, at the least, between the quicksets, but that such way was not, nor was intended to be, admitted to be a way of right for any other person or persons whomsoever than as aforesaid.

In pursuance of this award a road was set out with a quickset hedge on each side of it, being of the required width of thirty-three feet.

The defendants were the owners of a portion of Agar's allotment. The plaintiff was the lord of the manor, and also the owner of the land adjoining the highway mentioned in the award. The road set out by the award from Agar's allotment to the above-mentioned highway ran over part of the lord's said land.

The defendants had commenced building upon their land a number of villa residences, and for more convenient access to them they had commenced forming a solid granite road in lieu of the common cart-road which had for many years existed there; and they were also about to erect a bridge across a small stream called the Stell, which formed the boundary between the land allotted under the award and the high-road.

The plaintiff thereupon commenced this action, asking for an injunction restraining the defendants from erecting a bridge across the Stell, so as to rest upon or otherwise interfere with the piece of land belonging to the plaintiff situate on the south side of the high-road, and from making a road upon the eastern boundary of the plaintiff's said piece of land, and from exercising any rights of ownership thereupon, and from using the same piece of land otherwise than in accordance with their rights under the award, whereby, as the plaintiff alleged, a right of road solely for agricultural purposes over the plaintiff's said piece of land was given to the owners for the time being of the defendants' land; and for damages for wrongfully entering the plaintiff's piece of land and erecting the said bridge and making the road.

The plaintiff moved for an injunction as above. The motion was heard before Vice-Chancellor *Malins*, on the 21st of December, 1876.

When the case was opened, *Glasse*, Q. C., for the defendants, submitted, for the purpose of the present application, to an injunction as to the bridge proposed to be erected over the Stell. The Vice-Chancellor refused the motion as to the right of way, but continued the interim order as to the bridge. The plaintiff appealed.

Higgins, Q. C., and *Procter*, for the appellant.

Glasse, Q. C., and *W. W. Karlake*, for the defendants, were not called upon.

JESSEL, M. R. I think that this appeal cannot be maintained. The first question to be considered is, What is the effect of the grant? It is not very artificially worded, but we must look at it with regard to the nature of the case. The enclosure was carried out in a way that was common in former times,—by a deed to which all the allottees are parties. [His Lordship read the clauses which are set out above.]

The first point made was this: It was said that as this was a grant to the owner and owners for the time being of the lands, if the lands became

severed the owners of the severed portions could not exercise the right of way. I am of opinion that the law is quite clear the other way. Where the grant is in respect of the lands and not in respect of the person, it is severed when the lands are severed, that is, it goes with every part of the severed lands. On principle, this is clear. It never could have been contemplated in the case of an award like this that the property was never to be divided, nor is it to be contended that if a man died and left two or three daughters co-heiresses, and they partitioned the estate, the right of way was lost, and their allotments forever deprived of access to the highway. But, in addition to that, I think that the case is fairly covered by authority. In *Harris v. Drewe*, 2 B. & Ad. 164, a pew was granted by a faculty to John Emery and his family forever, and the owners and occupiers of the said messuage, exclusively of all other persons. The plaintiff Harris occupied a summer-house which he had converted into a house, and into which he had thrown one room of the old house. It was held that he had a right in the pew in respect of his occupation of that one room. Lord Tenterden says (2 B. & Ad. 166): "The plaintiff was the occupier of the summer-house and of one room which was part of the old dwelling-house. The faculty gave a right to the several persons who should be occupiers of the messuage to use the pew." And then Justice Littledale says: "I am of the same opinion. The plaintiff having a right by the faculty to use the pew, the churchwardens had no right to interfere as they did, and were wrongdoers. It may certainly happen, in consequence of a house being subdivided, that three or four families may become entitled to use a pew belonging to the original messuage." There are the very words, "owners and occupiers." The same point in another shape came before the Court of Queen's Bench in *Codling v. Johnson*, 9 B. & C. 933, 934, where in trespass *quare clausum fregit* the defendant prescribed in a *que* estate for a right of way over the *locus in quo*. It appeared that the defendant's land had within fifty years been part of a large common, and afterwards enclosed under the provisions of an Act of Parliament, and allotted to the defendant's ancestor, and it was held that notwithstanding this evidence the right claimed by the defendant's plea might in law exist, and the jury having found that in fact it did exist, the court refused to disturb the verdict. Justice Bayley there says: "It appears by the report that the jury were satisfied of the existence of this immemorial right of way. Suppose this land to have been part of the waste before the enclosure, then the lord might have the right for himself and his tenants to use the way, and then each person having an allotment under the enclosure would have the right of way." It seems to me, therefore, both on principle and authority, we must decide against the appellant.

The next point made was this: It was said that the grant conferred a right to use the way only so long as the allotment was used for agricultural purposes. I cannot find any such restriction. The right is to the owners or owner for the time being of the lands. Now land, accord-

ing to English law, includes everything on or under the soil ; all buildings that you may erect on it ; all mines that you may sink under it. If an allottee builds a house, or, as it is said here, twenty-six houses, on the land, the owner of each house, with the soil on which it stands, is an owner of part of the lands, and entitled to the benefit of the grant. Irrespectively of the technical meaning of the word "land," it could hardly be contended that on the occasion of an enclosure it was contemplated that at no time thereafter would any allottee erect on any part of these large allotments, which I see include old enclosures, any laborers' cottages, or any house or dwelling of any kind, or even a stable for his horses. I have no doubt, therefore, that the word "land" is used advisedly. This being so, it appears to me the right is a general right of way, a right of way to all the houses which may be built on the land in question.

Then it is said the provision that the allottees shall do as little damage as may be to the soil or the corn, grass, or herbage, prohibits what is now being done. That provision obviously is put in to show that if the way was not fenced off, the persons using it must only go from point to point in the shortest way, and not deviate over the field so as to damage the corn and grass more than necessary. It appears to me that these words by no means limit the right of the grantee to use the way for all reasonable purposes.

Then it was said, admitting the owner of each house to have a right of way, still the grantees have no right to enter upon the allotments over which the right of way is granted for the purpose of laying down a metalled road. Now, it was conceded to be the principle of law that the grantee of a right of way has a right to enter upon the land of the grantor over which the way extends for the purpose of making the grant effective, that is, to enable him to exercise the right granted to him. That includes not only keeping the road in repair, but the right of making a road. If you grant to me over a field a right of carriage-way to my house, I may enter upon your field and make over it a carriage-way sufficient to support the ordinary traffic of a carriage-way, otherwise the grant is of no use to me, because my carriage would sink up to the naves of the wheels in a week or two of wet weather. It cannot be contended that the word "repair" in such a case is limited to making good the defects in the original soil by subsidence or washing away, it must include the right of making the road such that it can be used for the purpose for which it is granted. Therefore I think the defendants have a right to make an effective carriage-way going, as they are going, by the shortest route, and not interfering with the land to a greater extent in width than the width of the street pointed out by the deed itself.

The last point was this : It was said, "Assuming the defendant has such a right, at all events he has not that right now, he has not yet completely built his house or houses ; they are only in process of building, and he is preparing to make his road before it is wanted." As to

that, it appears to me that we must look at the case in a reasonable way. If a man is building a house or houses, and he wants carts or carriages to go along the road, either to carry materials for the building, or with a view to the use of the inhabitants of the houses when built, it is not reasonable to say that he may not make his road till the house is completed and somebody is going to inhabit it. The reasonable thing is, that he may during the building do, by way of anticipation, that which he would, according to this argument, have the right to do the moment the house was completed. But there is an additional answer to that argument, that, assuming it to be sound, it would not justify an injunction. If a man is about completing a house, and would have the right to make a road to it as soon as it was completed, the intermediate damage occasioned by his making the road while the house is building must be of the most trifling description. It must be the loss for that short time of the grass which would grow over the road which was continually traversed by men, horses, and carriages. Such a case is certainly not one in which the court will interfere by injunction. Nor was the case really put on that ground. For these reasons, it appears to me that the judgment of the Vice-Chancellor ought to be upheld.

JAMES, L. J. I am of the same opinion. As to what was read from the Vice-Chancellor's judgment about this not being an easement, I think there must be some mistake. It is an easement, and our judgment is based upon its being such. Those rights which the Master of the Rolls has held to belong to the defendants, in which I fully concur, belong to them as the owners of an easement in respect of the dominant tenement as against the owner of the servient tenement. As to forming a substantial carriage-road, I agree with the Master of the Rolls. The case is not, in my opinion, one tenth part as strong or as difficult as *Dand v. Kingscote*, 6 M. & W. 174, on which we are told the Vice-Chancellor proceeded.

BAGGALLAY, J. A. I agree.¹

ATKINS v. BORDMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1840.

[*Reported 2 Ma. 457.*]

SHAW, C. J.² This cause, or rather several causes growing out of the same subject of controversy, has long been before the court; and it is to be regretted that all points of dispute, in regard to the relative

¹ See *United Land Co. v. Great Eastern Ry. Co.*, L. R. 10 Ch. 586, 590.

On the meaning of "ingress, egress, and regress," see *Somerset v. Great Western Ry. Co.*, 46 L. T. R. 883.

² The opinion only is given.

rights of the parties, have not yet been adjusted. Several questions have heretofore been decided, and the parties have acquiesced in the decisions, and adjusted their buildings in conformity with them. 20 Pick. 291.

The main question, which now remains for consideration, between these parties, is, whether the defendants had a right to erect a building over the passage way which, it is conceded, the plaintiff has a right to have, use, and enjoy, on the southerly side of the defendants' land. It appears that heretofore both of these tenements belonged to one person, and of course neither estate was then subject to any easement for the benefit of the other; because the owner, as the exclusive proprietor, might build upon any part, or use and appropriate any and every part of the estate at his own pleasure, as his own sense of his interest and convenience might dictate. It is obvious, that so long as two tenements remain the estate of the same owner, no right of easement can be created by use, however long continued; because such use cannot be adverse. Whenever, therefore, such proprietor conveys away part of the estate so situated, he may create, annex, and convey with the estate granted, such rights of way over his other estate retained, or other easements therein, as he may think fit; and also he may reserve out of the estate granted, and annex to his own estate retained, such easements as he may deem proper. And the acceptance of the deed by the grantee, whilst it gives him the benefit of the easements granted, subjects the granted estate, both in his own hands and in those of all others who may come in under him, to the easements reserved. It stands, therefore, upon the ground of convention, between those who have a disposing power.

There are cases, indeed, in which it is held, that long use may be given in evidence to establish the right of the grantee, in such case, to easements in and over the estate of the grantor; but on a very different principle from that on which prescription or presumed grant is founded. The right claimed depends on grant; but the question often arises, from the ambiguity, brevity, or uncertainty of the descriptive words used, what was the extent of such grant; in other words, what was the intention of the parties in making and accepting the grant. In ascertaining this intent, several rules of exposition are adopted, founded upon experience, to enable courts to determine, or to approximate to such meaning and intent. It is a rule, that the language of a conveyance shall be construed most strongly against the grantor; because it is his act, and the language that of his choice or dictation. Again, a grant being made for a valuable consideration, it shall be presumed that the grantor intended to convey, and the grantee expected to receive, the full benefit of it, and therefore that the grantor not only conveyed the thing specifically described, but all other things, so far as it was in his power to pass them, which were necessary to the enjoyment of the thing granted. Thus the grant of a mill actually driven by water, though not described as a water-mill in the deed, carries with it

a right to the stream which supplies the mill, although it comes to the mill wholly through other land of the grantor. He cannot divert it, and thus derogate from the beneficial effect of his grant. The grant of a messuage or tract of land, with no access to it but over other land of the grantor, is by implication a tacit grant of a convenient right of way to it over such other land. But there is another rule in ascertaining the meaning of parties where the deed is silent, or the language defective or ambiguous, and one to which we more particularly before alluded; and it is this: that it is competent, in order to show what the parties probably meant, where the language is not fully clear and unambiguous, to prove the local position, the relative situation of the estate granted, that of the estate reserved, and also the manner in which the grantor himself had used it, when owner of the whole. Such evidence of use of particular ways over one estate, in the occupation and enjoyment of the other, may tend to show what was necessary, or useful and convenient in this respect, and so considered by him who had a power to use both as he pleased, and therefore tends to show what, by necessary or reasonable implication, was intended. It is very clear that a grantor, by unequivocal words, may convey one estate by definite description, and create and annex thereto an easement in his own other land. This may also be done by necessary or reasonable implication, if the intent so to do can be inferred. Thus, if one grants an estate, with all the privileges and appurtenances, and there be a right of way over a third person's estate, that right of way passes. Indeed, such right of way passes as incident, though "appurtenances" are not expressed. *Kent v. Waite*, 10 Pick. 138. But if there be no such right of way, which may be legally and technically "appurtenant," but the grantor has commonly used a way thereto over his other land; in order to give effect to the manifest intent, it may be construed to pass a right over such land, not as an appurtenance before existing, but as an easement created by the deed itself, and annexed to the estate granted. So if one grant an estate, with the ways and other easements actually used and enjoyed therewith, evidence *aliunde*, by parol or otherwise, may be given to prove that a particular way was then in use by the grantor; and then it is held to pass as parcel of the estate conveyed. *White v. Crawford*, 10 Mass. 183. *Story v. Odin*, 12 Mass. 157. *Morris v. Edgington*, 3 Taunt. 24. *United States v. Appleton*, 1 Sumner, 492. *Salisbury v. Andrews*, 19 Pick. 250. This view may perhaps tend to reconcile authorities which may seem conflicting, tending on the one side to show that no length of time, or constancy of use, can create an easement over one estate for the benefit of another, whilst there is unity of title in one owner—and on the other, that long use by the grantor may be evidence of title to the easement in the grantee. The long and constant use of a way over the land of another, without interruption or objection, is evidence of right, because it is not to be presumed that an owner would permit such use without right. But the long and frequent use of a way over a part of

one's own estate, as conducive to the useful and convenient occupation of another part, tends to show that it was necessary or beneficial; and, therefore, if there be no other way, or if there be any words describing or alluding to a way actually used, or when ways "appurtenant" are expressed, and in fact there is no way technically appurtenant, such previous use by the owner may be available to give effect to the presumption that it was intended that such right of way should pass, as parcel of, or incident to, the estate granted.

With this view of the law before us, we are to look at the deed by which the defendants' estate was granted by the plaintiff's predecessor, to ascertain the nature and extent of the plaintiff's easements, for a disturbance of which, this action is brought. It has already been decided that in the present case the actual use and enjoyment, on the part of the plaintiff and his predecessors, over the estate of the defendants and their predecessors, have been so nearly in conformity with the provisions of the deed, that it is to be presumed that the parties intended to claim and hold their rights under it, and, therefore, that the plaintiff's rights depend on the reservations in the deed, and not on prescription. The law will not presume a non-appearing grant, or raise a prescription, where a grant is produced, to which his use, occupation and enjoyment may be ascribed. The court were of opinion, that the plaintiff's rights depended on the deed from Haugh to Henry Tew, in 1708. In this deed, the grantor, having described an existing gate and passage way, of about five feet wide, on the southerly side of the estate granted, leading from the street, now Washington Street, into the yard of said messuage, made the following reservation: "Reserving out of this bargain and sale, unto me the said Haugh, my heirs and assigns forever, free liberty of ingress, egress and regress through and upon the said gate or passage way, for carrying and recarrying wood, or any other thing through the same, and over the yard or ground of the said messuage hereby granted, into and from the housing and land of me the said Atherton Haugh adjoining, for the use and accommodation thereof, without damnifying or annoying thereby the said Henry Tew, his heirs and assigns." Upon the construction of this clause, the court decided, that a convenient right of passage way was reserved for the benefit of the plaintiff's estate, but that the width of it was not fixed. And we are still of opinion that that was the true construction. For, although the gate was described as "about five feet wide," there was no warranty of its width, and no words declaring that he should have the width of the way as it then existed, or any equivalent expression. And the word "about" indicates that it was not intended to be definite. It was therefore the right of a suitable and convenient passage for the purposes indicated. 20 Pick. 295.

On a subsequent trial, the plaintiff claimed a right to the use of the passage way, open to the sky, according to the lines of the south and west walls of the old building on the defendants' lot. As to arching over the passage way, the judge, at the trial, instructed the jury

that if this did not occasion any inconvenience by darkening it, or otherwise, in respect to the uses for which it was reserved, the plaintiff would not be entitled to any damage on this ground; but on this point they were instructed to assess separate damages. It appears that upon that ground, on that trial, the jury assessed damages in the sum of one dollar. On the same ground, the jury on the trial now under review, assessed damages in the sum of \$350. It therefore now becomes necessary more carefully to investigate the right thus claimed by the plaintiff, and examine the principle on which it rests; because, if it be true that the plaintiff has the right claimed, to have said passage way open to the sky, the defendants are under a corresponding obligation to take down their building, so far as it is erected over the said passage way.

The owner of an estate in fee, by virtue of his interest and power as proprietor, may make any and all beneficial uses of it at his own pleasure, and he may alter the mode of using it, by erecting or removing buildings over it, or digging into or under it, without restraint. *Cujus est solum, ejus est usque ad cælum*. If any other person has an easement in it, the owner has still all the beneficial use, which he can have consistently with the other's enjoyment of that easement. If the easement is a right of way, this consists in a right to use the surface of the soil, for the purpose of passing and repassing, and the incidental right of properly fitting the surface for that use; but the owner of the soil has all the rights and benefits of ownership, consistent with such easement. *Perley v. Chandler*, 6 Mass. 454. He is entitled to the herbage growing upon it. *Adams v. Emerson*, 6 Pick. 57. All which the person having the easement can lawfully claim is the use of the surface, for passing and repassing, with a right to enter upon and prepare it for that use, by levelling, gravelling, ploughing or paving, according to the nature of the way granted or reserved; that is, for a foot way, a horse way, or a way for all teams and carriages. When no actually existing way, as bounded and located, is granted or reserved, the right of way, in point of width and height, shall be such as is reasonably necessary and convenient for the purposes for which it is granted. If it be a foot way only, it shall be reasonably wide and high for all persons to pass on foot, with such things as are usually carried by foot passengers. If it be a way for teams and carriages, it shall be of sufficient height and breadth to admit of carriages of the largest size in common use, and high enough for loads of hay, and other similar vehicles usually moved by teams. Under such circumstances, what is a reasonable height and width, is partly a question of fact, and partly a question of law; the facts all being found by the jury, what is a reasonable width and height is a question of law; or, to express the same thing in other words, what was intended by the parties to be the nature and extent of the right granted, is an inference of law, to be drawn from the terms of the instrument of grant, interpreted and explained by the facts and circumstances thus found by the jury.

When no dimensions of a way are expressed, but the object is ex-

pressed, the dimensions must be inferred to be such as are reasonably sufficient for the accomplishment of that object. In the present case, the dimensions of the way are not expressed; but the purpose for which it was reserved is expressed, and it goes far to enable us to ascertain the dimensions. It was for the purpose of carrying wood, or any other thing, into and from the grantor's "housing and land adjoining, for the use and accommodation thereof." The grantor's adjoining house, being a dwelling-house, it is to be limited to articles usually carried to or from a dwelling-house, in its ordinary occupation as such. It thereby excludes the presumption that it was to be adapted to the carriage of merchandise, such as bales, boxes, or casks. Wood must be taken to be fire-wood, and not timber or wood to be used for the purposes of manufacturing. And "any other thing," though in terms of the largest sense, must be construed to mean other thing of like kind used in a dwelling-house; as vegetables, provisions, furniture, and the like. Without examining it more minutely, we are satisfied that the right reserved was that of a suitable and convenient foot-way to and from the grantor's dwelling-house, of suitable height and dimensions to carry in and out furniture, provisions and necessaries for family use, and to use for that purpose wheelbarrows, hand-sleds, and such small vehicles as are commonly used for that purpose, in passing to and from the street to the dwelling in the rear, through a foot passage, in a closely built and thickly settled town.

Upon these views of the rules and principles of law applicable to the present case, the court are of opinion that the defendants had a perfect right to build over the said passage way; it being one of the beneficial uses of the property which could be made, and which, as owners, they had a right to make, consistently with the full and free enjoyment of the foot way on the part of the plaintiff.

We think that this opinion is not inconsistent with the opinions heretofore given at *nisi prius*, and by the whole court, though perhaps the point was not stated with sufficient precision for the purposes of deciding definitely the rights of these parties, and putting an end to the long controversy which has subsisted between them. For this purpose, it is necessary to distinguish accurately between an act, which is of itself an infringement of another's right, and an act which of itself is not an infringement of the right of another, but which, in its consequences, may cause a damage to that other. In the former case, no special damage, no actual pecuniary loss, need be stated or proved; the law presumes that a party sustains some damage from the infringement of his right, and enables him to maintain an action, whether he have suffered actual damage or not. And in such case, it is often highly proper that a party should bring his action, though he may expect to recover nominal damages only, for the purpose of vindicating his right, and thereby preventing the adverse party from acquiring a right by long and uninterrupted use. 16 Pick. 247.¹

¹ An action lies for the obstruction of a private way without proof of actual damage. *Collins v. St. Peters*, 85 Vt. 618, 621.

But there is another class of cases, where although the act complained of may not be unlawful, or, if unlawful, not an infringement of any right of the plaintiff, no action can be maintained without alleging and proving a special and particular damage to the plaintiff; and the damages to be recovered are confined to an indemnity for the loss thus proved to have been sustained. The plaintiff sets forth the act done, and alleges that by means thereof, he sustained the damage complained of, technically called declaring with a *per quod*. As where the plaintiff complained that while he was proceeding along a navigable creek with his barge laden, &c., the defendant obstructed the creek, *per quod* the plaintiff was compelled to carry his goods around, at a great expense. In such case the action lies for the special damage immediately occasioned by the obstruction; but it would not lie for the obstruction itself, without special damage, because although it was an infringement of a public right, and so was unlawful, yet it was not an infringement of the peculiar right of the plaintiff. *Rose v. Miles*, 4 M. & S. 101. So for special damage occasioned by obstructing a highway. *Greasy v. Codling*, 2 Bing. 263. So by a proprietor of land through which a watercourse runs, against a proprietor higher up, where the gravamen of the complaint against the upper proprietor was, that by damming up the water above, it came with greater impetuosity, and thereby injured his banks. *Williams v. Morland*, 2 Barn. & Cres. 910; s. c. 4 Dowl. & Ryl. 583. But it might be otherwise, where the plaintiff had acquired a right to the water by appropriation, and the complaint was for the infringement of that right. *Bealey v. Shaw*, 6 East, 208. It is manifest, we think, that this distinction has become important in the present case, because a jury have heretofore given one dollar for this item, treating it as a case of mere nominal damages; whereas, the verdict now under consideration assesses that item of damage at \$350.

We have stated that the opinion now expressed will not appear, upon strict comparison, to be inconsistent with those formerly expressed, though in the former cases the rule prescribed may have been less precise and definite. It may, therefore, be proper to review them. On the first trial, the jury were instructed as to the passage way, that the reservation in the deed was answered, by giving the plaintiff a passage way as convenient as it was when the reservation was made; that if the present passage way was not so wide as before, and was not open above, yet if it was as convenient, &c.; but that the defendants had no right to narrow or cover the passage, so as to cause serious inconvenience to the owners, &c. The observation of the court, when this part of the case came before them on a motion for a new trial, was, that by the case it appeared that the passage had been narrowed and arched over, and rendered darker and less convenient. And in reference to the instruction to the jury, that so far as the plaintiff had suffered inconvenience from the alteration, he was entitled to recover damage, the court say that this was correct. 20 Pick. 295.

It is manifest, we think, that in these remarks, so far as they related to the dimensions of the passage way, the court considered that the passage way, as it was, in point of convenience, at the time it was reserved, and the width of it, for the purpose for which it was reserved, might be considered as equivalent, and that the one description was used instead of the other. For, in this same opinion the court say, that they are satisfied that a convenient right of way was reserved, but that its width was not fixed. 20 Pick. 295. But if it was to be a passage way as it existed at the time of the reservation, its width would have been fixed. In point of fact, as the buildings then stood, the passage used was of irregular breadth, being for a part of the way eight or nine feet wide. As a definition of the plaintiff's right, it would have been more exact to say, that it was a right of way suitable and convenient for the purpose for which it was reserved, namely, as a foot way from a public street to a dwelling-house in the rear, and for carrying wood and other articles, incident to the occupation and enjoyment of such a dwelling-house. This admits of any alteration and improvement in the estate over which the easement is reserved, consistent with the preservation and maintenance of the right of passage itself. So it has been held in analogous cases. A grant of water, sufficient to supply a grist mill, limits the quantity of water, but not the use to which it is to be applied. If, in the progress of improvement in the useful arts, the owner removes the grist mill, and erects a cotton factory, it is held, that he has a right to do so, taking no more water for his factory, than he had a right to take for his grist mill. Such construction is conformable alike to the rules of law, and to the principles of public policy. The law, carrying into effect the intention of the parties, does not intend to restrict the right of ownership of the real estate subjected, further than is necessary to give full effect to the easement; and public policy requires, as well in cities as elsewhere, that an owner of real estate should be allowed to make all the improvements upon it which can be made consistently with the just rights of others.

So far as the remark of the court applied to the darkening of the passage way, it did not go on the distinction between doing an act, which the defendants have no right to do, by building over the passage way, and doing that which they had a right to do, but doing it in such a manner as to cause some slight consequential damage to the plaintiff. Besides, the damages given by the jury on that ground, being merely nominal, and the instruction not being wrong in point of law, and especially as the plaintiff was entitled to hold his verdict for other damages, the court had no good reason for setting aside the verdict, even though it might have appeared to them, that, upon the evidence, no case for any consequential damages was established in point of fact.

In saying, that the actual condition of the way, at the time of the reservation, is not the measure and definition of the plaintiff's right, it is necessary to guard against two misconstructions of this remark. We do not mean to say, that when a way is actually located and fixed by

definite and visible objects, as by buildings or fences, the grant or reservation may not refer to such way actually existing, and that the limits then would not be fixed by the act of the parties themselves. The contrary is true in such case. *Salisbury v. Andrews*, 19 Pick. 250. Even where an estate is granted with all ways "appurtenant," and there is, strictly speaking, no way appurtenant, but there is an actually existing way over the grantor's other land, it shall be taken, that the way actually used and existing, though miscalled "appurtenant," shall pass; because it must be understood that such was the intent of the parties. *Morris v. Edgington*, 3 Taunt. 24. The other misconception, against which we would guard, is this: when it is said, that in such a case as the present, the actually existing state of the passage way, at the time of the reservation, is not the measure or description of the right reserved, we do not mean to say, that such state of the passage way may not be evidence, and often evidence of a very forcible and determinate character, to prove what is reasonable and convenient, and what those most conversant with the matter have, by their practice, shown to be in their opinion most reasonable and convenient, under given circumstances. And this goes far to show what was in the mind of the court, when they seemed to consider the actual condition of the way, at the time of the reservation, as equivalent to the convenient passage way reserved by the deed.

This cause again came before the court in June, 1838. The judge, on that trial, had instructed the jury, that as to arching over the passage way, if it did not occasion any inconvenience, by darkening it or otherwise, in respect to the uses for which it was reserved, the plaintiff would not be entitled to any damages on this ground. 20 Pick. 298. This is wholly consistent with the opinion now expressed, but without stating definitely what were the rights of the defendants, as owners, over the passage way, and therefore less explicit than it might have been useful to state it, under the circumstances. In regard to the breadth, the jury were instructed, that the defendants were bound to maintain a passage way, equal in breadth to the distance between the old gate posts, and otherwise convenient for the uses for which it was reserved. 20 Pick. 299. The former part of this direction was, we think, inaccurate, in taking the distance between the gate posts as the measure of the plaintiff's right; but supposing that width and a reasonable width to be practically the same thing, this mode of laying down the rule would lead to no practical error in the result. The opinion of the whole court, on this part of the case, was extremely brief, and we are apprehensive that from its conciseness, or from the implications which it carries, rather than from anything expressed, it may have led to an erroneous application of the rule of law, in the subsequent trial. It is thus stated: "The right of way from Washington Street to the rear of the defendants' buildings seems to be definite and certain. The use of it, as it existed in fact from the date of the reservation to the time of the trial, has been satisfactorily ascertained. It was then uncovered.

No right to cover it was granted. The jury have found it to be darkened and injured by the arch over it, and have assessed damages for the injury. Of this there can be no complaint." 20 Pick. 302, 303.

The way, indeed, was definite and certain as to its direction and the purpose for which it was reserved; and the long use was good evidence of what the parties concerned understood as necessary and convenient. But when it is said, that the passage way was then uncovered, and no right to cover it was granted, especially as the plaintiff claimed a right to have it open to the sky, it may have been understood, though not so expressed, that without such right granted, the defendants had no such right. We think it could not have been so intended, and that the court did not pass upon that question; especially as the opinion immediately proceeds to state, that the jury have found that it had been "*darkened and injured* by the arch over it," and assessed damages for the injury. Supposing, then, that the defendants had a right to arch the passage over, yet, if in the exercise of that right, they had done it in such a manner as to injure the plaintiff, and that by means thereof he had suffered special damage, he might recover the damages given in that case, on the principle of the maxim, that every one shall so use his own property and his own right, as not to injure another. This principle may be well illustrated by a recent case. The defendants were erecting a steam boiler and apparatus on land adjoining the premises of the plaintiff, and by some mismanagement it exploded and did damage to the plaintiff's buildings. The defendants were held liable. *Witte v. Hague*, 2 Dowl. & Ryl. 33.

It therefore does not appear whether the damages, given for arching over the passage way, were given for a supposed violation of the plaintiff's right in the estate, or for a supposed consequential special damage done to the plaintiff, in the exercise of the defendants' own right in a careless or improper manner; and there was nothing in the instruction to the jury, under which that verdict was found, to show that they were not given on the latter ground; in which case there was no reason to set aside the verdict. The amount of the damages was not such as to indicate that the jury might not have proceeded on the latter ground, or to call the particular attention of the court to the distinction between these grounds. We think, therefore, that the question now distinctly brought before the court has not been decided by any of the opinions heretofore given by the court. That question is, whether the defendants had a right to build over the passage way. On that question, for the reasons hereinbefore expressed, the court are of opinion, that the defendants, as owners of the land, had a right to build over the ground on which the passage way in question was reserved; that the plaintiff, under his reserved privilege, had no right to have it open above to the sky, or to any other height, except so far as necessary and convenient for the uses of the foot way reserved, sufficient in height and breadth for the purposes expressed in such reservation.

Having taken this more broad and extended view of the rights of

these parties, and the grounds of law on which they rest, it will be the less necessary to take into consideration the particular exceptions to the charge of the judge, upon which the cause now comes before us. So far as the judge charged the jury, that the defendants had no right to arch over the passage, and use the space over it for any purpose of building, such charge was erroneous, and had a tendency to mislead the jury. We are also of opinion, that so far as the judge instructed the jury, that the defendants were bound to keep open a passage way equal in width to the distance between the old gate post, it was not strictly correct, although a passage of such width, and one of reasonable width, might not practically differ. We are aware that a similar instruction had before been given at *nisi prius*, but it was before the case had been so fully considered as at present.

For the reasons already given, the court are of opinion that the instruction of the judge was incorrect, so far as he directed the jury that the defendants were liable for damages if the new passage was rendered more *inconvenient*, by being covered, by reason of its being made a place of resort, or by being darkened, or otherwise.

As to the darkening, we think the jury should have been instructed, that the defendants were not liable for damages, unless, from the length of the passage way, it was so darkened as to render it unfit for the purposes of a passage way. We may conceive of a covered passage of eight or ten feet high, of a length so considerable, that unless openings were left, there would not be light enough admitted at the ends to enable persons to use it with comfort, for the purposes of a passage way. But unless darkened to that extent, it is not a case for damages. It must render the premises to a sensible degree less valuable for the purposes of business. *Parker v. Smith*, 5 Car. & P. 438; *Back v. Stacey*, 2 Car. & P. 465; *Wells v. Ody*, 7 Car. & P. 410; *Pringle v. Wernham*, 7 Car. & P. 377.

We think, also, that the jury should have been instructed, that the defendants were not liable for damages by reason of this covered passage being made, to a greater extent, a place of resort by other persons; first, because the consequential damage from that cause is too remote to be made the subject of an action; but more especially, because the plaintiff must either keep the passage closed, and thus prevent the entrance of other persons, or seek his remedy by law, against those who do the actual injury.¹

S. Hubbard and W. Phillips, for the defendants.

Fletcher and Choate, for the plaintiff.²

¹ The rest of the opinion, relating to another question, is omitted.

² *Grafton v. Moir*, 130 N. Y. 465, *accord*. And so in case of a way definitely located by the acts of the parties. *Gerrish v. Shattuck*, 132 Mass. 235.

BAKEMAN v. TALBOT.

COURT OF APPEALS OF NEW YORK. 1865.

[Reported 81 N. Y. 366.]

THE action is in the nature of a bill in equity to establish a right of way claimed by the plaintiff over the land of the defendant; and to enjoin the latter from continuing certain fences which he had erected, and to compel him to remove them. A farm, of which the premises owned by the plaintiff and those owned by the defendant are parcels, embracing a certain lot No. 179, was formerly owned by one De Groot, who died intestate in 1838, leaving children, to whom the land descended. Partition was made between them by suit in chancery in the year 1839. The commissioners appointed by the court to make partition divided the farm into several smaller lots, and allotted the one numbered 12 to the party under whom the plaintiff derived title by a subsequent conveyance. Lots numbers 9, 10, and 11 were set off to parties under whom the defendant subsequently acquired title. The four lots were wood lots, and lay adjoining each other, and are bounded on the north by the northerly line of the original farm, the plaintiff's being the eastermost of the four lots. There is a public highway running westerly of the lots. The report of the commissioners (which was confirmed by the court) contains the following provision: "The right of way or passage is reserved to the said heirs respectively, and to their heirs and assigns, from the highway, near the west line of said lot number 179, and immediately adjoining the north line of the farm aforesaid, and extending east along the north line of said farm to the extreme east corner of the wood lots aforesaid, to enable them to pass to and from their respective wood lots for the purpose of obtaining wood and timber therefrom, or for any other purpose." The plaintiff's lot remained unimproved, but the defendant's had been cleared and were under cultivation. The defendant, before the commencement of the suit, had built a fence between his eastermost lot and the plaintiff's lot, and also fences between each of his other lots, each fence running quite to his northerly line. Two of the fences were built with stakes, "with rails to slip between them like bars." The other was of rails, and had what is called in the case a "slip gate" at the northerly end, which was the place he passed, so that the rails could be taken out and turned round, and so that the plaintiff could pass through. After the commencement of the suit, the defendant put up bars on the lines of three of the lots. The plaintiff's premises being a wood lot, he had no occasion to use the reserved passage way except at long intervals.

The plaintiff claimed that the defendant ought to have placed gates at the place of passage; but this the defendant refused to do, upon which the plaintiff threatened to leave the fences down, and the defendant threatened him with personal violence if he should do so.

The judge (Hon. *Daniel Pratt*, before whom the case was tried without a jury), after stating the foregoing particulars as conclusions of fact, determined, that although the plaintiff was entitled to a right of passage over the defendant's land at the place indicated, yet that the maintaining the fences there was not an obstruction which the plaintiff was entitled to have removed. Judgment was accordingly given in favor of the defendant, with costs, upon which the plaintiff prosecuted this appeal.

The case was submitted on printed points.

A. J. Parker, for the appellant.

L. H. and F. Hiscock, for the respondent.

DENIO, C. J. No question is made but that the plaintiff is entitled to a right of way or passage across the north end of the defendant's land. The extent of that right, and the duty of the respective owners towards each other, is to be determined by the language of the reservation and the circumstances of the case. The plaintiff insists, in substance, that the defendant was bound to keep open a narrow road or lane across the north end of his land, or if he will not do this, that he should, at least, insert swinging gates in his fences which might be opened and shut with ease whenever the plaintiff had occasion to pass. What the defendant did, as I understand the testimony and the judge's conclusions, was to subdivide his land in the manner which he found convenient for its occupation, running the fences quite to his northerly line, making arrangements, however, at the place indicated for passage, by which the bars or rails could be readily removed and conveniently replaced when the plaintiff should have occasion to go through. This would no doubt be somewhat less beneficial to the plaintiff than either a clear space like a common road, or a series of gates which could be opened and shut like doors. But it would be much less onerous to the defendant, who, upon the plaintiff's position, would have to forego the use of a considerable strip of land, and, in addition, to build a lateral fence across the whole north end of the premises, or to incur considerable expense in erecting gates. I am of opinion that the defendant's position presents the more reasonable view of the case. The main object of the reservation in the commissioner's report was to enable those of the proprietors who should become the owners of the lots most remote from the highway to go upon and pass over the land of the others situated between them and the highway, without committing a trespass, and to define the direction of such passage. We are not to intend that it was designed to make the burden unnecessarily onerous. The circumstance that the land was wholly in forest, and that the primary purpose indicated was the carrying of wood and timber, do not suggest the necessity of a thoroughfare like a highway, or an unimpeded private way. If the passage was made as convenient as the mode of access which a farmer usually provides for himself to get to and from his wood land, it seems to me that the purposes of the reservation would be confirmed. De Groot formerly possessed the whole farm. It was about to be subdivided and assigned in severalty to different owners.

It would be improper that those to whom back lots were assigned should be precluded from getting to the highway except by committing a trespass, or by claiming a way by necessity, — a right but little known, and not of convenient application. Moreover the exigencies of the case did not contemplate a constant use of the passage, but only such an occasional use as the resort to wood land would require, and such as the plaintiff has since exercised. There is no reason to believe that if the plaintiff, besides owning the backwood lot, had also been the proprietor of the intervening cleared land, he would have found it necessary or thought it expedient to have fenced out a lane, or have erected these gates for his use in passing to and from his timber land; and if he would not have done so, it is unreasonable to require it of the defendant. The defendant certainly has no right to preclude the plaintiff from availing himself of the right of passage, or to render the exercise of that right unusually or unreasonably difficult or burdensome. I think he is not shown to have done so. It must be kept in mind that the plaintiff's lot is still wood land. It may remain so for many years; but it may be cleared up and cultivated, and have buildings erected on it and be applied to such uses as to require constant and frequent passage between it and the highway. There is nothing inconsistent in holding that the present arrangements are suitable and sufficient under existing circumstances; and after these circumstances have changed, and the question shall arise as to what shall then be proper, to determine that a passage perpetually open or a system of gates better adapted to such increased use than the present fences and bars, shall be required of the defendant. It would not be right at this time to oblige the defendant to furnish facilities for a state of affairs which may never arise, or which may not arise until some remote period. The doctrine that the facilities for passage where a private right of way exists, are to be regulated by the nature of the case and the circumstances of the time and place, is very well settled by authority. *Hemp-hill v. The City of Boston*, 8 Cush. 195; *Cowling v. Higginson*, 4 Mees. & Wels. 245. The last case determines, in effect, that the extent of the privilege created by the dedication of a private right of passage depends upon the circumstances, and raises a question for the determination of a jury. If, therefore, in the present case I felt less confidence in the conclusion I have stated than I do, I should hold the question had been settled by the judge sitting in the place of a jury in a manner that we could not disturb.¹

The judgment should be affirmed.

¹ The concurring opinion of BROWN, J., is omitted. And see *Baker v. Frick*, 45 Md. 337; *Mineral Springs Mfg. Co. v. McCarthy*, 67 Conn. 279.

The principle of *Bakeman v. Talbot* applies to a way by prescription. *Dyer v. Walker*, 99 Wis. 404. But see *Fankboner v. Corder*, 127 Ind. 164; *Shivers v. Shivers*, 32 N. J. Eq. 578, affirmed in 35 ib. 562.

On the right of the dominant owner to fence a way, see *Sizer v. Quinlan*, 82 Wis. 390; *Harvey v. Crane*, 85 Mich. 316.

WHITTIER v. WINKLEY.

SUPREME COURT OF NEW HAMPSHIRE. 1882.

[Reported 62 N. H. 338.]

TRESPASS, *quare clausum*, tried by the court. The defendants own a tract of land in Newton, about a quarter of a mile from the highway. The only access to it is by a cart-path over land adjoining the highway, now owned by the plaintiff. Originally the plaintiff's father owned both tracts, but he sold the tract bounded by the highway, and thereafter continued to use the cart-path across it in going to and from the rear lot, until his decease in 1830. Before the defendants bought the rear lot, in 1880, a part of it had been cultivated, and the remainder had been used as a pasture and wood-lot, the cart-path being used in connection with the lot for these purposes. Recently the defendants have erected on their lot houses for the storage of ice obtained from an adjoining pond, a dwelling-house for the occupancy of the laborers, and a barn for the accommodation of the teams employed in the ice business. Materials for the buildings, saw-dust for packing the ice, and provisions for the men and teams were drawn from the highway over the cart-path, and it is this use of the cart-path of which the plaintiff complains. The defendants have no other way from their lot to the highway.

The defendants requested the court to rule that if the plaintiff's father sold the front land, retaining the ownership and possession of the land in the rear, now owned by the defendants, there would be reserved by law a way of necessity for him and his assigns from the rear land over the land so sold to the highway, and that the right of way would permit the uses made of it by the defendants; but the court declined so to rule, and found a verdict for the plaintiff. The defendants excepted.

W. E. Jewell (of Massachusetts), for the defendants.

J. W. Towle and *J. S. H. Frink*, for the plaintiff.

STANLEY, J. The conveyance of land to which there is no reasonable or useful access except over other adjoining land of the grantor, or land of a stranger, is sufficient to raise the presumption that a way over the grantor's land is intended by the parties to pass as a necessary incident of the land granted. It is reasonable to suppose that the grantee bought the land for some useful purpose, and if he cannot enjoy the beneficial use of it except by means of a way over the adjoining land of the grantor, it is but reasonable and just to find that he acquired such a way. The same reasoning applies when a grantor retains land which he cannot use without crossing the land conveyed. A way of necessity is reserved to him in the grantee's land. *Pingree v. McDuffie*, 56 N. H. 306; Wash. Ease. 49. The plaintiff concedes

that a way of necessity in the front lot was reserved by his father for agricultural purposes. But he claims that the right of way is limited by the use made of the rear lot at the time of the grant out of which the easement issues; that the rear lot being then used for agricultural purposes only, the way is limited thereby, and cannot be used for the necessary accommodation of commercial or manufacturing industries on that lot. Such a limitation on the enjoyment of a way not expressly restricted in the grant, if not contrary to the public policy of encouraging industrial enterprises (*Olcott v. Thompson*, 59 N. H. 154, 156; *Myers v. Dunn*, 49 Conn. 71, 77), is not supported by the evident intention of the parties of which the grant is evidence.

In *Corporation of London v. Riggs*, L. R. 13 Ch. Div. 798, 806, which is an authority for the plaintiff's position, Jessell, M. R., treats the question as a new one, being unable to find any authorities bearing directly upon it, and expressing fears as to the correctness of his conclusion. Stating the general rule, which is strongly supported by ancient cases, that a grantor is not allowed to derogate from the terms of his grant, he argues that the implied reservation of a way of necessity is an exception, and that, when found to exist, it ought to be strictly construed. But upon modern authorities, the interpretation of a deed or other written contract is the ascertainment of the fact of the parties' intention by means of legal evidence; and the question is, not whether there is some inflexible rule of law established by ancient authority by which the parties' rights are to be determined, but what was their intention in fact. *Rice v. Society*, 56 N. H. 191, 197, 199; *Houghton v. Pattee*, 58 N. H. 326; *Brown v. Bartlett*, 58 N. H. 511; *Kimball v. Lancaster*, 60 N. H. 264, 273; *Crocker v. Hill*, 61 N. H. 345, 346. The Master of the Rolls reached the conclusion that the way impliedly reserved to the grantor is only such a right as will enable him to use the reserved land in the way it is used at the time of the reservation or grant. How much importance was attached to the fact that he was then considering an exception to a general rule of law is not apparent; but it is to be noted that he does not discuss the question of fact as to the probable intention of the parties, though he substantially admits that the existence of some right of way of necessity is based on the evident intention of the parties that the grantor should not be excluded from occupying and using his land. But why should not the extent of the use, as a question of intention, be determined in the same manner?

There might be a case where no use had ever been made of the rear lot, as where it consisted of an unopened ledge, or a wilderness which had always been a useless piece of property. By the rule applied in *Corporation of London v. Riggs*, a way of necessity to the unimproved land would be reserved to the grantor, because he is presumed to retain it for some useful purpose, but he would not be entitled to use his reserved way in connection with his land, because the land had never been used or improved. The first part of this rule seems to rest

on the understanding of the parties, inferred from legal evidence, that there should be a way, while the latter part seems to have been invented for the purpose of defeating their equally apparent intention that it might be used. To confine the use of the way to the purposes for which the land is occupied at a particular time is to exclude the grantor in the case of an implied reservation, and the grantee, in the case of an implied grant of a way, from using their land in any other manner. It is a practical limitation on the estate retained or conveyed. If the parties supposed a way passed as a necessary incident of the grant, how can it be inferred that they intended only a way for a particular purpose, when they knew the land was capable of being used for many purposes?

In *Myers v. Dunn*, 49 Conn. 71, 77, the court say, "The plaintiff claims that inasmuch as both the defendant's grantor and himself bought wood and pasture land, having a way adapted to it in that condition, he is not now entitled to a way over the *locus in quo* for the increased necessities of a lot having a house upon it. But this claim is without foundation. The owner of land has a right to the most profitable use, the most beneficial enjoyment, thereof, subject to limitations not necessary here to be mentioned. He may erect buildings and raise grain upon and dig ores beneath it; and when, by their conveyance to the defendant's grantor, the administrators imposed, in favor of the land granted, a way of necessity over the *locus in quo*, they are presumed to have intentionally done it for any and all of these purposes; and the law will declare that it may be used for all, for it desires and encourages proprietors to increase the value of their land by building houses upon and cultivating it." If the fact of the necessity for the way is evidence that the parties intended by the deed to recognize and establish such an easement (Wash. Easement. 51), the fact that it is necessary for all purposes to which the land is adapted, is evidence that a general and not a limited way was intended. A deed conveying land for all lawful purposes furnishes no evidence that the implied way of necessity was intended to be used for the accomplishment of one of those purposes only. The necessity is originally co-extensive with all the lawful uses of which the rear lot is capable, and is not created by the appropriation of the land to those uses.

If, in the deed of the plaintiff's father conveying the front lot, a way across it from the highway to his otherwise inaccessible lot in the rear had been expressly reserved, probably the defendants' right to use the way as they have would not have been questioned. In *Abbott v. Butler*, 59 N. H. 317, it was held that a right of way, granted or reserved without limit of use, may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted. See, also, *Johnson v. Kinnicut*, 2 Cush. 153; *Holt v. Sargent*, 15 Gray 97, 102; *Sargent v. Hubbard*, 102 Mass. 380. But if, when a way is expressly granted in a deed, with no limit as to its use, it is presumed or found that a general way was intended, it may be difficult

to explain why, when it is found to exist by implication, it should on the same evidence be held to be a limited or special way. In both cases its existence is a matter of intention proved by different evidentiary facts, and its extent, or the extent of its use, is also a matter of intention, but is founded on the same evidence. Having the same evidence in its support in both cases, the fact of intention must be the same in both.

As there is no evidence in this case showing that when the way was reserved the parties intended to limit its use by the uses then made of the rear lot, the refusal of the court to rule that the defendants were entitled to use the way for the accomplishment of all lawful purposes to which their land was adapted was error. *Verdict set aside.*¹

CARPENTER, J., did not sit: the others concurred.

ATTORNEY-GENERAL v. WILLIAMS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[Reported 140 Mass. 320.]

INFORMATION in equity, at the relation of the Harbor and Land Commissioners, to restrain the erection of bay windows or projections extending into or over a passage way in the rear of the defendant's house on the corner of Boylston Street and Exeter Street in Boston. Hearing before *Devens*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

H. N. Shepard, Assistant Attorney-General, for the plaintiff.

E. R. Hoar and *F. A. Brooks*, for the defendant.

C. ALLEN, J. The first question which we have to consider is, whether an information in the name of the Attorney-General can be maintained to enforce the stipulations in respect to the passage way. In *Attorney-General v. Gardiner*, 117 Mass. 492, it is declared that the Commonwealth, in devising the scheme of improvement of the Back Bay lands, acted in a twofold capacity, — as the proprietor of lands which it held and might sell, and as the sovereign power, authorized to lay out highways for the benefit of the public; and that, in the latter capacity, it might enforce these provisions and restrictions, against all persons bound by them, by an information in equity in the name of the Attorney-General. It is suggested that there is a distinction between that case and the present in this particular, — that there the information was brought to enforce restrictions imposed against building on the front part of the lots bounding on the highway, for the benefit of the public, while here it is brought only in the interest of a few private owners of the adjacent property bounding on the passage way. But the Commonwealth properly reserved to itself the right to enter upon

¹ Cf. *Serff v. Acton Local Board*, 81 Ch. D. 679

the premises by its agents, and, at the expense of the party in fault, to remove or alter, in conformity with the stipulations, any building, or portion thereof, which might be erected on the premises in a manner or to a use contrary to the stipulations. Also, by the Pub. Sta. c. 19, § 5, in all cases where the Commonwealth has such right, all grantees under the deeds by which such right is reserved, and their legal representatives and assigns, may by proceeding in equity compel the board of Harbor and Land Commissioners so to enter and remove or alter such building or portion thereof.

It does not, in this case, appear affirmatively that the Commonwealth has sold all of its land in the neighborhood of the premises in question, and that it has no direct pecuniary interest in enforcing the stipulations. But assuming the fact to be so, it still has a duty to perform in this respect. Moreover, it may be said to have constituted itself a trustee for all the parties in interest, by the form of the stipulation, with the implied assent of each grantee who takes a deed containing it. In either aspect, it has such an interest and duty as to entitle it, by its proper officer, to sue in this court on behalf of the rights and interests of those who claim its protection.

The principal ground of objection to the maintenance of the information is, that the defendant has not infringed upon the stipulation referred to. Before considering this question in the light of the particular stipulation, it may be well to review some of the principal authorities cited at the argument. The leading case upon this subject is *Atkins v. Bordman*, 2 Met. 457, where it was held that the owner of land, over which his grantor had reserved a passage way, might, under the peculiar circumstances of that case, lawfully cover such passage way with a building, if he left a space so wide, high, and light that the way was substantially as convenient as before for the purposes for which it was reserved. There, from the language of the reservation, construed in the light of the existing facts and circumstances, the right reserved was held to be that of "a suitable and convenient footway to and from the grantor's dwelling-house, of suitable height and dimensions to carry in and out furniture, provisions, and necessities for family use, and to use for that purpose wheelbarrows, hand-sleds, and such small vehicles as are commonly used for that purpose, in passing to and from the street to the dwelling in the rear, through a foot passage, in a closely built and thickly settled town." It was a use which was individual to the occupant of that house, and not for the public. It was limited to certain simple uses, connected with getting things into and out of the house. It is obvious that the rights of the single person entitled under such circumstances to a passage way are not necessarily identical with the rights involved in the present case.

In *Schworer v. Boylston Market Association*, 99 Mass. 285, the provision in the deed establishing the passage way declared that it should "not be subject to have any fence or building erected thereon;" and this was held to give a right to have the entire court or passage

way kept open to the sky, for light, air, and prospect, and every other accommodation and advantage which such an open court might furnish to an estate abutting upon it.

In *Brooks v. Reynolds*, 106 Mass. 31, the passage way was declared in the deed to be for light and air, and was always to be kept open for the purpose aforesaid; and this was held to give a right to the open and unobstructed passage of light and air from the ground upwards, and throughout the length of the passage way.

The case of *Salisbury v. Andrews*, 128 Mass. 336, is more like the present case. There tenants in common had laid out their land in Boston with a passage way or court, upon both sides of which they had erected buildings fronting upon the way; and, by a deed of partition of the property, they provided that the way "shall be left and always lie open for the passage way or court aforesaid, for the common use and benefit of both of said parties and their respective estates." It was held that the right of an owner under this deed was not simply a right of way, but a right to the use and benefit of an open court, extending as well to the light and air above as to actual travel upon the surface of the earth.

It is necessary now to look at the terms of the bond in which the stipulation relied on in the present case is contained, in order to see what it means. In the first place, it is to be borne in mind that the place in question is a part of a great scheme of improvement of waste land in a city, for streets and dwellings. The description of the land carefully defines the width and lines of the passage way: "running one hundred and twelve feet to a passage way sixteen feet wide; thence westerly on the line of said passage way; . . . also all that part of said passage way sixteen feet wide that lies southerly of its centre line, and between the easterly and westerly lines of said premises extended; reference being had to the plan accompanying the fifth annual report of the Commissioners on the Back Bay." A reference to the plan shows a system of streets, covering an extensive territory, with passage ways for the accommodation of the houses on two streets, and for access to their rear entrances. "Any building erected on the premises shall be at least three stories high for the main part thereof, and shall not in any event be used for a stable or for any mechanical or manufacturing purposes." There were also other provisions showing that dwelling-houses of a high class were contemplated. Afterwards followed the particular stipulation relied on, "that a passage way sixteen feet wide is to be laid out in the rear of the premises, the same to be filled in by the Commonwealth, and to be kept open and maintained by the abutters in common."

It was contemplated that buildings might be erected on both sides of this passage way. Each owner might build up to the line of it. The defendant has done so, and has built bay windows from a point eight feet above the sidewalk, and extending from three to four feet into the passage way, to the top of his house, six stories high. If the oppo-

site owner should do the same, the passage way between the buildings, extending upwards from a point beginning eight feet above the surface of the ground, would be eight feet, instead of sixteen, in width. It would be half closed up, so far as light and air and prospect are concerned. And, if this may be done, it is difficult to place any practical limit to what might be done in this manner. The passage way was designed as a thoroughfare for the accommodation of many persons. In appearance, it is on the plan indistinguishable from a narrow street. It is connected at each end with broad and important streets. It was to be kept open. No gates could be put at the ends of it. It was to be "maintained," that is, kept in good order for use. Its width shows that it was designed for vehicles drawn by horses, as well as for travellers afoot. The supplies for all the houses on both sides of it, for its entire length, would be chiefly deliverable, and all refuse matter removable, by its means. Thus we have a passage way of defined dimensions, in the rear of all the houses on two broad streets, designed for use by all who may have occasion to seek the rear entrances to any of the houses on either street, — a passage way available also for police purposes and for use in the extinguishment of fires, — a passage way which is to be maintained, and kept open, and designed for horses and wagons, in a part of a large city which is designed to be wholly occupied by dwellings of a high class, to which air and light and prospect are not only desirable, but essential, in the rear as well as in the front, with no limitation to the use which may be made of it or of the persons by whom it may be used.

In view of these considerations, we think the language of the stipulation was designed to signify a separation of sixteen feet at least between the rear portions of the buildings abutting on the passage way. A passage way sixteen feet wide was not merely to be kept open at the ends, but open to the sky throughout its entire length, for the general convenience and benefit. It is easy to see that the rights of others would be lessened, upon any other construction. The opposite owner, who might not wish in like manner to build into the passage way, would have in the rear of his house a space just so much the narrower. The adjacent owner on the same side, who did not wish to occupy a part of the passage way with his building, would have light, air, and prospect cut off. The right themselves to occupy the passage in this manner would be no equivalent to owners who did not wish to build their houses so as to extend back to the line of it.

There is nothing in the facts proved at the hearing and reported to us which in any way controls the construction thus put upon the language of the stipulation. The result is, that a decree must be entered for the removal of the projections. *Decree accordingly.*¹

NOTE. — MISCELLANEOUS EASEMENTS. The principal easements are those above specified. Easements cannot be created *ad libitum*. See *Norcross v. James*, 140 Mass.

¹ The rest of the case is omitted.

188, *post*, p. 511. Among easements which have been allowed are, to get water from a stream, *Race v. Ward*, 4 E. & B. 702, *ante*, p. 10; to fasten a sign-board to the wall of a house, *Moody v. Steggles*, 12 Ch. D. 261; to drive a pile in a river, *Lancaster v. Eve*, 5 C. B. (N. S.) 717; to pile and hoist boxes, *Richardson v. Pond*, 15 Gray, 387. Rights to pews and burial rights are of a very varied character: sometimes a freehold right in the soil is created; sometimes an easement; sometimes the right is personal property; sometimes it is only a license.

HERMAN v. ROBERTS.

COURT OF APPEALS OF NEW YORK. 1890.

[Reported 119 N. Y. 37.]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 1, 1888, which affirmed a judgment in favor of plaintiff, entered on the decision of the court on trial at Special Term.

This action was brought to restrain defendant from injuring, by alleged improper use, a carriage road which Philip Herman, the plaintiff's testator, had constructed over the lands of the defendant under the grant of the right of way from the defendant to the said Herman.

The grant was executed and delivered October 30, 1871. By it the defendant granted to Philip Herman a right of way "over the lands of the party of the first part, from the north line of the party of the second part to the public highway, leading from Lewisburgh to the old post road . . . on a line now staked out to be forty feet wide between the fences crossing the lands of the party of the first part;" defendant agreed to build one-half the fence and keep it in repair.

The case showed that, prior to the grant, Herman had a summer residence upon his premises. He wished to have a carriage road down a hillside across the defendant's farm to the Lewisburgh road. The defendant staked out such a line of road as he was willing to grant the right of way for, and thereupon the above grant was executed. It divided defendant's farm, leaving a lot of about two and a half acres upon the westerly side. The main portion of defendant's farm and all his buildings were upon the easterly side. Herman constructed a carriage road, grading, macadamizing and covering it with gravel, at an expense of \$700, and maintained it in good condition down to the commencement of this action. He built a fence upon the westerly side, leaving a gateway in the fence upon the easterly side for the use of defendant. The defendant built a fence upon the easterly side of the road leaving a bar-way in it for his own use.

The court upon trial awarded a perpetual injunction enjoining him "from interfering in any way with the use and enjoyment of the road-way, and for using the same for farming or business purposes in such or any manner as to damage or in any wise injure the roadway, or road-

bed as now constructed." Herman having died since the trial, his executrix was substituted as plaintiff.

Further facts appear in the opinion.

Frank B. Lown, for appellant.

J. Newton Fiero for respondent.

RUGER, C. J. The evidence in the case was quite conflicting, and the principal dispute on the trial was whether the defendant had so used the plaintiff's right of way, as to injure and impair it, and require the making of repairs thereon to restore its usefulness.

The trial court found, as a matter of fact, "that the defendant has used said roadway for carrying produce and farming utensils upon and along the same to the injury and annoyance of plaintiff, and threatened to use the same whenever he deems necessary for such purposes and to use all force necessary for him to pass over such roadway in such manner." The evidence fully supported this finding and tended to show that the defendant had cut up and injured the road-bed by drawing heavy loads over it, and placing stones thereon which obstructed the passage.

Under established rules this court is concluded by this finding and must assume that the defendant had used the roadway in such manner as to injure it and threatened a continuance of such use.

This fact clearly entitled the plaintiff to a remedy by injunction to restrain its improper use. The plaintiff obtained this right of way by purchase and grant from the defendant and it consisted of a piece of land, "as now staked out," across defendant's farm, running from the plaintiff's land to the public highway, a distance of about 900 feet, and was plainly intended to facilitate the plaintiff's access to the public road from his residence. This residence was built and used as a gentleman's country seat, and had no other connection with this public road than the way thus purchased. The land through which the road was constructed was rocky and uneven and was not adapted to purposes of cultivation or for a carriage road until it had been prepared for that purpose by the plaintiff, which was done at considerable labor and expense. No reservation of a right to use such road by the defendant was incorporated in the deed, and his right to such use depends altogether upon the extent of his interest as the owner of the soil in the servient estate.

No substantial difference exists between the parties as to the rules of law governing the rights of the respective parties in the premises, and the controversy seems to be reduced to the question whether the use proved, was materially injurious to the road. Both parties have referred, for the law governing the case, to the rule laid down by Washburn in his work on Easements (p. 188), stating that "all that the person having the easement can lawfully claim is the use of the surface for passing and repassing, with a right to enter upon and prepare it for that use," and that "the owner of the soil of a way, whether public or private, may make any and all uses to which the land can be

applied and all profits which can be derived from it consistently with the enjoyment of the easement."

The conveyance of the right of way unquestionably gave the grantee not only a right to an unobstructed passage, at all times, over the defendant's land, but also all such rights as were incident or necessary to the enjoyment of such right of passage. *Bliss v. Greeley*, 45 N. Y. 671; *Maxwell v. McAtee*, 9 B. Mon. 21. The grantee thus acquired the right to enter upon the land and construct such a road-bed as he desired and to keep the same in repair. He could break up the soil, level irregularities, fill up depressions, blast rocks, and not only remove impediments, but supply deficiencies in order to constitute a good road. He had a right to exclude strangers from its use, and to restrict such use of it by the owner of the servient tenement, as was inconsistent with the enjoyment of his easement. The owner of the soil was under no obligation to repair the road, as that duty belongs to the party for whose benefit it is constructed. 2 Washburn on Real Estate, 311; 2 Hilliard on Real Estate, 101.

In considering the extent of the rights of the respective parties in the grant of a right of way it is not proper to refer to the parol negotiations which preceded its execution or the colloquium accompanying it (*Bayard v. Malcolm*, 1 Johns. 467; *Renard v. Sampson*, 12 N. Y. 561; *Long v. N. Y. C. R. R. Co.*, 50 N. Y. 76); but we are to regard the language of the grant and, when that is uncertain or ambiguous, the circumstances surrounding it, and the situation of the parties with a view of arriving at the true intent of the parties, as was said in *Bakeman v. Talbot*, 31 N. Y. 370: "The doctrine that the facilities for passage, where a private right of way exists, are to be regulated by the nature of the case and the circumstances of the time and place, is very well settled by authority." In *Burnham v. Nevins*, 144 Mass. 92, Morton, C. J., says: "These general principles are that a man who owns land subject to an easement, has the right to use his land in any way not inconsistent with the easement, and that the extent of the easement claimed must be determined by the true construction of the grant or reservation by which it is created, aided by any circumstances surrounding the estate and the parties, which have a legitimate tendency to show the intention of the parties." See, also, *Onthank v. L. S. & M. S. R. R. Co.*, 71 N. Y. 194.

Under these rules it is obvious that the rights of the owner of the easement are paramount to the extent of the grant, and those of the owner of the soil are subject to the exercise of such rights. It cannot be assumed, in the absence of any provisions looking thereto in the grant, that the grantor intended to reserve any use of the land which should limit or disturb the full and unrestricted enjoyment of the easement granted. The purpose contemplated by the grant was the creation of an easement for the plaintiff's use, and not the reservation to the owner of the use of his land. Every use by the owner was abandoned except such as might be made in a mode entirely consistent with the full and

undisturbed enjoyment by the grantee of the easement. The idea of a joint use of the land by both parties, in the sense that a use by the grantee should at any time give way to a use by the grantor, is contrary to the plain meaning and intent of the grant. It cannot be supposed that the grantor when conveying a right of way over an impassable tract of land intended to restrict his grantee from changing its surface so as to make it passable and available for the purpose of a road, or that, after the road had been so constructed, he had the right to enter upon the land and impair its usefulness, or impose upon the grantee the duty of keeping such impaired road in repair for the benefit of the grantor. The full extent of the rights of the grantor in the soil of the road was to enter thereon and do such acts only as should not injure or impair the enjoyment of the easement by the grantee, and when he went beyond such use, he transcended the rights pertaining to his character as the owner of the soil. The general character of these rights is familiar to all owners of land, because they are common to all whose lands abut upon public roads, and they are varied only by the character of the easements enjoyed, and the terms of the grants under which they are possessed. Unless, therefore, something can be found in the terms of the grant which modifies the easement created, that must be held to be the measure of the rights of the parties. No inference can be drawn from the present grant that it was intended that the grantor should enjoy the unrestricted use of the road with the privilege of so wearing and using it as to subject the grantee to the labor and expense of keeping it in repair. It is apparent, from the character of the property affected and the use to be made thereof, that the plaintiff expected to construct a carriage road for access to and communication with his residence as a gentleman's country-seat. It could not have been contemplated by the parties that such a road was to be used for farming purposes, to draw heavy loads over, and cut it up by the use of the various appliances needed for such purposes. The land over which the road was laid out had never before been so used and the owner of the soil had theretofore obtained access to his land from the public road by entering upon and travelling over it in other places. The land itself was of small compass and little value, as it was hilly, rocky, sterile and unadapted to agricultural uses, and it could not, under the circumstances, have been intended that the road was to be built and used to any considerable extent for farming purposes by either the grantor or grantee. The building of fences on both sides of the road showed an intention to preserve it from indiscriminate use, and while the construction of a bar-way on either side manifested a design that the defendant might thereby have access to his land and cross the road, it was not intended, we think, to give him liberty to so use the road as to impair or destroy its usefulness or character as a carriage road for private use. The right of way granted was to be forty feet wide and the grantor had a right thereunder, not only to a free passage over the travelled part, but also to a free passage over

such portion of the land, enclosed as a way, as he thought proper or necessary to use. *Herrick v. Stover*, 5 Wend. 580; *Drake v. Rogers*, 3 Hill, 604; *Wood's Nuisances*, § 260. The deposit of stone or other obstructions on such enclosed space in such a way as to interrupt the enjoyment of the easement, constituted an obstruction which was inconsistent with the rights possessed by the grantee, and could be properly prevented by injunction. The use of such land for agricultural purposes; the raising of crops or the deposit of materials thereon, except, perhaps, for temporary purposes, was clearly inconsistent with the rights conveyed by the grant.

It is difficult, if not impossible, to lay down a clear and definite line of use which shall enable the parties always to determine what may be considered a proper and reasonable use as distinguished from an unreasonable and improper one, and such questions must, of necessity, be usually left to the determination of a jury, or the trial court, as a question of fact. *Bakeman v. Talbot*, 31 N. Y. 366; *Huson v. Young*, 4 Lans. 64; *Prentice v. Geiger*, 74 N. Y. 342.

It is not supposed that it was the intention of the court below to wholly preclude the defendant from the use of the roadway by passing over or across it in such manner as should not materially obstruct passage, or injure the road-bed; but it was only intended to prevent an unreasonable use thereof which should sensibly impair its condition or render its use offensive and impracticable to the plaintiff and others having lawful occasion to pass over it.

We think the findings of the trial court are conclusive upon us as to the proper use of the road by the defendant, and that an injunction was properly awarded against him. Some of the members of this court are, however, apprehensive that the order made by the court below is not sufficiently explicit and may be subject to misunderstanding and misconstruction. We have, therefore, thought best to change its form, so as to express more clearly the rights and duties of the respective parties. The words "wilfully or unreasonably" should be inserted after the word "interfering" in the sixth line of the order in the place of the words "in any way;" and also after the word "as" in the ninth line of said order.

With these modifications the judgment should be affirmed with costs.

All concur, ANDREWS, J., in result, except FINCH, J., dissenting.

*Judgment accordingly.*¹

¹ "A right of way carries with it all rights to the use of the soil, properly incident to the free exercise and enjoyment of the right granted or reserved. A right of way to a warehouse would, in our judgment, authorize the tenant of the warehouse to place on the ground goods brought to the warehouse, and keep them a reasonable and convenient length of time, to put them in store; and to place and keep goods on the ground a reasonable length of time, which are to be carried from the warehouse. And what would be reasonable and convenient, would be a question of fact, dependent on many circumstances. What would be an unreasonable length of time to leave goods on the sidewalk or in the street, when much frequented, would not be unreasonable on rear ground, when they would incommode no one having an

NOTE. — LIGHT. There are many cases in the English books on the extent of easements of light acquired by prescription or by implication; but as, generally, in the United States, such easements can be acquired only by express grant, it does not seem desirable to give any of those cases at length here. References to a few cases on the extent of the right are appended.

"It must not be forgotten that whatever observations fell from Lord Eldon in the case of *Attorney-General v. Nichol*, 16 Ves. 388, 343, or from Lord Westbury in *Jackson v. Duke of Newcastle*, 3 D. J. & S. 275, the settled law is now as laid down in *Back v. Stacey*, 2 Car. & P. 466, with the slight alteration (as the Vice-Chancellor Wood points out, Law Rep. 2 Eq. 246) of the single word 'or' for 'and.' With that alteration the law stands thus: 'In order to give a right of action, and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable or to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done.' That is necessary in order to get damages at law. Whether it was always so, I am by no means sure. If that is necessary to get damages at law, those are the very circumstances which entitle the plaintiff to an injunction in equity, subject to this, that the damages must be substantial, though one can hardly conceive a case in which, if the doctrine of *Back v. Stacey* is well founded (and I believe it is), the tenant in possession would not get substantial damages. The only case in which I conceive there would be damages not substantial, would be the case of a reversioner who would not sustain any immediate damage, and who might bring an action to try the right. Then Vice-Chancellor Wood says (Law Rep. 2 Eq. 246): 'Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the further difficulty, that in equity we must not always give relief (it was so laid down by Lord Eldon and by Lord Westbury) where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this: that where substantial damages would be given at law, as distinguished from some small sum of £5, £10, or £20, this court will interpose; and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbor have a right to purchase him out without any Act of Parliament for that purpose having been obtained.'

"It seems to me that that gives a reasonable rule, whatever the law may have been in former times. As I understand it, the rule now is — and I shall so decide in future, unless in the meantime the Appeal Court shall decide differently — that wherever an action can be maintained at law, and really substantial damages, or perhaps I should say considerable damages (for some people may say that £20 is substantial damages), can be recovered at law, there the injunction ought to follow in equity: generally, not universally, because I have something to add upon that subject. In this case I do not think that anybody would doubt the damages would be substantial. The obstruction would in fact destroy the use of the room altogether; it would so darken it that perhaps it might be used for a cellar, or a similar purpose where no light was required; but for ordinary purposes it would destroy the use of the room." *Per* SIR GEORGE JESSEL, M. R., in *Aynsley v. Glover*, L. R. 18 Eq. 544, 552 (1874). See *Wells v. Ody*, 7 C. & P. 410; *Arcedekne v. Kelt*, 2 Giff. 683; *Clarke v. Clark*, L. R. 1 Ch. 16; *Warren v. Brown*, (1902) 1 K. B. 15.

On the supposed rule of 45° as the limit of what constitutes an obstruction, see *Beadel v. Perry*, L. R. 3 Eq. 465; *City of London Brewery Co. v. Tennant*, L. R. 9 Ch.

equal right of way. But here the case expressly finds that the place was used as a place for the deposit of merchandise, which is another and distinct use from that reserved, and which, whether valuable or not, remains with the owner of the land. So the defendants seem to have thought, for, on objection being made, they ceased to use the land as a place of deposit, and did not claim it as a reserved right. Still, such yielding of the right was no satisfaction for damages already accrued, however small; and therefore, it being in violation of the plaintiff's right, he was entitled to nominal damages." *SHAW, C. J.*, in *Appleton v. Fullerton*, 1 Gray, 186, 192 (1854).

212; *Hackett v. Baiss*, L. R. 20 Eq. 494; *Theed v. Debenham*, 2 Ch. D. 165; *Parker v. First Avenue Hotel*, 24 Ch. D. 282.

MISCELLANEOUS EASEMENTS. The principal easements are those above specified. Easements cannot be created *ad libitum*. See *Norcross v. James*, 140 Mass. 188, *post*, p. 442. But by the aid of other principles in the law, rights analogous to easements may, within certain limits, be created, although the nature of such rights would not admit of their being made true easements; see *Covenants as to the Use of Land*, c. 318, *infra*. Among easements which have been allowed are, to get water from a stream, *Race v. Ward*, 4 E. & B. 702, *ante*, p. 10; to fasten a sign-board to the wall of a house, *Moody v. Steggles*, 12 Ch. D. 261; to drive a pile in a river, *Lancaster v. Eve*, 5 C. B. (N. S.) 717; to pile and hoist boxes, *Richardson v. Pond*, 15 Gray, 387; to draw seines upon a beach, *Hart v. Chalker*, 5 Conn. 311. Rights to pews and burial rights are of a very varied character: sometimes a freehold right in the soil is created; sometimes an easement; sometimes the right is personal property; sometimes it is only a license; see *Attorney-General v. Federal Street Meeting House*, 8 Gray, 1, 45.

REMEDIES FOR INTERFERENCE WITH NATURAL RIGHTS AND DISTURBANCE OF EASEMENTS. A. On the right of action by the possessor of land to which a natural right is incident or to which an easement is appurtenant, although he is not at the time of the interference actually employing the right or easement, see:

1. As to natural rights: *Sturges v. Bridgman*, 11 Ch. D. 852, *ante*, p. 56; *Dana v. Valentine*, 5 Met. 8; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590, *ante*, p. 90; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769, 772; *Harrop v. Hirst*, L. R. 4 Ex. 48; *Roberts v. Gwyrfaui District Council*, [1899] 1 Ch. 583, *ante*, p. 99; *Blodgett v. Stone*, 60 N. H. 167.

2. As to easements: *Bower v. Hill*, 1 Bing. N. C. 549; *Moore v. Hall*, 3 Q. B. D. 178; *Aynsley v. Glover*, L. R. 18 Eq. 544; *Collins v. St. Peters*, 65 Vt. 618.

It is no answer by the defendant to say that others are doing a similar wrong. *Crossley v. Lightowler*, *supra*; *Rogers v. Stewart*, 5 Vt. 215.

B. On the right of a reversioner to sue:

Merely showing an interference with the natural right or the easement is not enough; he must show an injury to the reversion. The difficulty lies in determining whether such an injury is shown. It is often said that the distinction is between an injury of a permanent character and one simply temporary. A permanent injury was found and a remedy given to the reversioner in *Jesser v. Gifford*, 4 Burr. 2141; *Bell v. Midland R. Co.*, 10 C. B. (N. S.) 287; *Mayfair Propy. Co. v. Johnston* (1894), 1 Ch. 506; *Baker v. Sanderson*, 3 Pick. 348; *Lund v. New Bedford*, 121 Mass. 286; *Hine v. N. Y. Elevated R. R. Co.*, 128 N. Y. 571; *Kernochan v. Manhattan R. R.*, 161 N. Y. 839. *Kidgkill v. Moor*, 91 C. B. 364, came up on motion in arrest of judgment. A temporary injury only was considered as shown in *Simpson v. Savage*, 1 C. B. (N. S.) 347; *Matt v. Shoolbred*, L. R. 20 Eq. 22; *Cooper v. Crabtree*, 20 Ch. D. 589. Cf. *Johnstone v. Hall*, 2 K. & J. 414.

These principles apply to cases of tenancies at will. *Hastings v. Livermore*, 7 Gray, 194.

On the analogous question whether in an action for a nuisance or the disturbance of an easement, entire damages are recoverable in one action or only compensation to the date of the writ, see *Sedgwick, Damages* (8th ed.), §§ 91-95.

MAINTENANCE AND REPAIR OF EASEMENTS. The grant of an estate or easement carries with it by implication whatever incidental right is necessary to its beneficial enjoyment, provided the grantor has power to bestow it. Thus the grant of a right of way implies a right to make or mend the way. So the grant of a right of turbary implies a right not only to cut the turfs, but also to stack them for removal. Such implications do not add to the extent of the grant as expressed: they simply make it serviceable within the limits expressed." *DURFEE, C. J.*, in *Fiske v. Wetmore*, 15 R. I. 354, 361 (1887). And see *Edgett v. Douglass*, 144 Pa. 95, 102.

So the grantee of a way has the right to make it reasonably passable, although thereby other parts of the premises are rendered inaccessible to the servient owner.

White v. Eagle & Phenix Hotel Co., 68 N. H. 88. And see *Gerrard v. Cooke*, 2 B & P. N. R. 109.

Where a statute authorized the taking of land for a drain and provided that compensation should be made "for such actual damage only as will be sustained by entering upon the land and constructing the drain," it was held that the assessment of damages must include compensation for the perpetual privilege of entering for the purpose of repairing the drain. *Chronic v. Pugh*, 136 Ill. 589 (1891).

One who has the right to dig and maintain a canal of a certain width over the land of another, has the right to throw the earth excavated on other land of the grantor along the edge of the canal. *Wheeler v. Wilder*, 61 N. H. 2. On the right to clean a raceway, see *Prescott v. White*, 21 Pick. 341. On the right to clean a natural water-course, see *Prescott v. Williams*, 5 Met. 429.

One who has a right of way by prescription may keep it in repair although there is no proof of repairs having been made during the period when the way was being acquired. *McMillan v. Cronin*, 75 N. Y. 474.

"By common law, he who has the use of a thing ought to repair it." LORD MANSFIELD, C. J., in *Taylor v. Whitehead*, 2 Doug. 745, ante, p. 199 (1781). And the servient owner is under no obligation to repair. *Pomfret v. Ricroft*, 1 Saund. 321. Yet he may not wilfully interfere with the easement. *Pomfret v. Ricroft*, supra; *Goodhart v. Hyett*, 25 Ch. D. 182. But he is not deprived of the use of his land for purposes for which it is reasonably adapted. E. g., where A has a right to maintain a dam on B's land or to carry water across B's land, B may allow his cattle to pasture upon the land though they trample the dam or the banks of the ditch. *Durfee v. Garvey*, 78 Cal. 546; *Joslin v. Sones*, 80 Iowa, 584.

A owned the upper part of a house, and B owned the lower part. B refused to join A in necessary repairs on the upper part of the house. A then made the repairs, and sued B in assumpsit for contribution. Held, the action did not lie. *Loring v. Bacon*, 4 Mass. 575. Nor does case lie by the lower owner against the upper owner for not repairing. *Cheeseborough v. Green*, 10 Conn. 818; *Pierce v. Dyer*, 109 Mass. 374; and see *Ottumwa Lodge v. Lewis*, 84 Iowa, 67. In *Cheeseborough v. Green*, supra, it was suggested that relief might be had in a court of equity.

On a prescriptive obligation to contribute to the cost of maintenance and repair of a dam, see *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, post, p. 446.

In *Campbell v. Mesier*, 4 John. Ch. 834, KENT, C., enforced contribution by one of the owners of a party wall at the suit of the other, for rebuilding the wall, which was ruinous. See *Sanders v. Martin*, 2 Lea, 213; *Sherred v. Cicco*, 4 Sandf. S. C. 480, ante, p. 181.

D. Fencing.

ANONYMOUS.

KING'S BENCH. 1440.

[Reported Year Book, 19 Hen. VI. 33, pl. 68.]

A WRIT of trespass was brought. And the plaintiff declared that the defendant, with force and arms, entered into his close at F., and with his cattle broke down his hedges to his damage of ten pounds. *Yelverton*. You ought not to have an action, for we say, as to the coming with force and arms and the entry into the close, Not guilty. And as to the remainder of the trespass, we say that we were seised of an acre

of land in the vill of B., which adjoins your close in F., and we say that we put our beasts into our lands to pasture them, and we say further that there is a hedge which is between the land of the plaintiff in which, &c., and our land aforesaid, which the plaintiff and all those whose estate he has in the same close, have been used, from time immemorial, to make and repair, and because the hedge was open and broken, and waste, our beasts entered into his close, and did the trespass, which is the same trespass for which he has brought this action. And it was held for a good plea by the whole court. *Quod nota.*¹

LAWRENCE v. JENKINS.

QUEEN'S BENCH. 1873.

[*Reported L. R. 8 Q. B. 274.*]

CASE on appeal from the County Court of Monmouthshire holden at Newport.

The plaintiff's cause of action was thus laid in the plaint. The plaintiff claims £40, the damages sustained by reason of two of his cows, on or about the 27th of December, 1871, being killed from eating the foliage of a yew tree, which had been then recently felled in a wood of the defendant, which adjoins the plaintiff's land, and into which wood the cows escaped from the plaintiff's land in consequence of the neglect of the defendant to repair a fence belonging to him dividing the wood and land, and which fence the defendant of right ought to maintain in repair.

The plaintiff was possessed of and occupied a close of land, and the defendant was possessed of and occupied another close of land, being wood land, adjoining the close of the plaintiff, and separated from it by a fence, which was on the defendant's close and was the property of the defendant.

In October, 1871, the defendant sold the fallage of the wood on his close to one Higgins, who accordingly, by his servants, felled the trees and underwood growing thereon; but the defendant did not part with any portion of the soil of his close, which he continued to occupy.

A short time before the 27th of December, 1871, the servants of Higgins felled a beech tree standing near the fence in such a manner that it fell over the fence and broke down a large part of it. The beech tree was felled in a negligent manner. Whilst the beech tree lay on the fence the branches filled up the gap made by its fall; but a few days afterwards the branches were removed by the servants of Higgins, and after they were so removed, until the 27th of December, there was a

¹ One who is bound to fence is under no duty or liability to one whose cattle are not lawfully on the adjoining land. See *Devaston v. Payne*, 2 H. Bl. 527, *post*, p. 508.

considerable gap or opening in the fence, sufficiently large for cattle to pass from one close to the other, during all which time the fence was out of repair ; but it was not brought to the knowledge of the defendant or his bailiff that the fence had been so broken.

On the 26th of December the servants of Higgins had felled a yew tree a few yards from the fence and near the spot where the beech tree had been felled. The yew tree was allowed to remain during the night of the 26th in the place where it had been felled. During the night of the 26th the plaintiff's cows, then being lawfully upon the plaintiff's close, escaped through the gap in the fence out of the close of the plaintiff into that of the defendant, and in the morning of the 27th they were found on the close of the defendant near the yew tree.

About midday on the 27th the cows died ; and the judge found as a fact that they died from eating some of the foliage of the yew tree, which when eaten to excess is destructive to cattle. At that time of the year there was very little verdure or green food in the fields, and the cows, from being foddered on dry food, were the more inclined to browse the green foliage.

Evidence was given that for more than forty years the fence had been repaired whenever repairs were necessary by the owners and occupiers of the defendant's wood ; and also, that on several occasions during the last nineteen years the fence had been repaired by the defendant and his predecessors in estate upon notice being given to him or his bailiff by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired, it was for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of it into the close of the defendant.

It was contended for the plaintiff, first, that the facts established an obligation on the part of the defendant to repair and keep in repair the fence for the purposes aforesaid ; secondly, that the damage was not too remote to enable the plaintiff to maintain this action ; thirdly, that the defendant was liable in this action. Each of these points was contested by the defendant, who also contended that the damage was attributable to the felling of the yew tree, relying on *Butler v. Hunter*, 7 H. & N. 826 ; 31 L. J. Ex. 214.

The judge found as a fact that there was an obligation on the part of the defendant to repair, and keep in repair, the fence, for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of the same into the close of the defendant.

He also considered that the damage was not too remote to enable the plaintiff to maintain this action.

The judge found as a fact that the escape of the cows from their own pasture was caused by the negligence of the servants of Higgins, either in not so felling the beech tree as to prevent its falling on the hedge, or, if that was not preventible, in not temporarily fencing round the gap until the tree could be removed and the gap be properly stopped ; and he was of opinion that it was the duty of Higgins to so cut and remove

the wood as not to injure the rights of the plaintiff. He also found that, neither the defendant nor his bailiff, to whom the management of this wood land was intrusted, received notice of the fence having been broken down. And he held, on the authority of *Longmeid v. Holliday*, 6 Ex. 761; 20 L. J. Ex. 490, and *Butler v. Hunter*, that Mr. Higgins (and not the defendant) was responsible for the loss of the cows, as the result of his servants' negligence; and he directed a nonsuit to be entered.

In case of this decision being reversed on appeal, he assessed the plaintiff's damages at £40.

The question for the opinion of the court was, whether the defendant is liable in this action.

Herschell, Q. C. (with him *Petheram*), for the plaintiff.

Michael, for the defendant.

The judgment of the court (COCKBURN, C. J., MELLOR and ARCHIBALD, JJ.), was delivered by

ARCHIBALD, J.¹ The only point in this case as to which we felt any degree of hesitation at the time of the argument, was the question whether or not the defendant was entitled to a reasonable time to repair the fence after he might or ought to have had notice that it had been broken down. For, assuming that the obligation to which he was subject was to maintain, at all times, and without notice to repair it, a sufficient fence for the benefit of the plaintiff's close, we had no doubt that the learned judge of the county court was wrong in holding that the defendant was not legally responsible for the loss of the plaintiff's cows.

We concur in opinion with the learned judge, that the damage was not too remote; but we think that the cases cited by him, *Longmeid v. Holliday* and *Butler v. Hunter*, are inapplicable; and, without expressing any opinion as to the liability of Higgins, we are of opinion that, if the obligation to maintain the fence be such as we have assumed, the defendant would be liable in this action.

On further consideration we have come to the conclusion, upon the evidence set forth in the case, that the defendant was bound at his peril to maintain at all times, and without notice to repair it, a sufficient fence; and that, except in the case of damage by the act of God or *vis major*, he would be answerable for damage sustained by cattle escaping from the plaintiff's close by reason of the defective state of the fence, and proximately due to that cause.

At common law the owners of adjoining closes are not bound to fence either against or for the benefit of each other; but in the absence of fences each owner is bound to prevent his cattle or other animals from trespassing on his neighbor's premises.

By prescription, however, a landowner may be bound to maintain a fence upon his land for the benefit of the occupier of the adjoining close. This obligation is described by Gale in his work on Easements

¹ The judgment was read by MELLOR, J. — REP.

as in the nature of a spurious easement affecting the land of the party who is bound to maintain the fence. Gale on Easements, 4th ed. p. 460; *Star v. Rookesby*, 1 Salk. 385; *Boyle v. Tamlyn*, 6 B. & C. at pp. 337-9.

A party entitled by prescription to the benefit of the fence might formerly, by means of a writ *de curia claudenda* (Fitzh. Nat. Brev. 127), have compelled the adjoining owner to repair it, and have recovered damages as well for the non-repair;¹ and a plea in an action of trespass for injury done by cattle, that the plaintiff is bound by prescription to fence against the defendant's cattle, is a good plea: *Novel v. Smith*, Cro. Eliz. 709 — the party bound by prescription being answerable to the owner for whose benefit the fence is to be maintained for all damage reasonably attributable to its defective condition.

It was held, therefore, in an anonymous case in Ventris, 1 Vent. 264, where a horse of the plaintiff's escaped into the defendant's field through defect of a fence which the defendant was bound to maintain, and was killed by falling into a ditch in the field, that the defendant was liable; and in a later case, *Rooth v. Wilson*, 1 B. & Ald. 59, that it made no difference that the plaintiff was only a gratuitous bailee of the horse which escaped and was killed. The same view of the law was acted upon in the case of *Powell v. Salisbury*, 2 Y. & J. 391, where the defendant was held liable for the loss of cattle which escaped from an adjoining field through a defective fence which he was bound to repair, and were killed on his premises by the falling of a haystack.

In all these cases, however, the prescription to maintain and repair obviously implies the pre-existence of the fence, and the right consequently to have it always existing as a fence; in other words, in a condition sufficient both to prevent the cattle of the owner entitled to it from escaping out of his close, and also to protect him from trespasses by his neighbor's cattle, and renders it, we think, incumbent on the party upon whom the prescriptive obligation is imposed to repair the fence in time to prevent its becoming defective, and subjects him to all risks of injury that may be done to it by strangers or trespassers.

We think, therefore, that, as the true nature of the prescription is that the defendant was bound at his own risk to have a sufficient fence always existing, he was liable to the plaintiff notwithstanding he had no knowledge of the injury done to the fence; and consequently that the decision of the County Court should be reversed, and judgment given for the plaintiff.

Judgment for the plaintiff.

¹ "Where there was no prescription, but the tenant had made an agreement to fence, yet he could not be compelled to fence, and the party injured by the breach of the agreement had no remedy, but by an action on the agreement. In the case of a prescription to fence, he could be obliged to fence by the writ of *curia claudenda*, sued by the tenant of the adjoining close, who might also recover damages by the writ." PARSONS, C. J., in *Rust v. Low*, 6 Mass. 90, 94 (1800).

CASTNER v. RIEGEL.

SUPREME COURT OF NEW JERSEY. 1892.

[Reported 64 N. J. L. 498.]

ON *certiorari* removing to this court an order made by two of the township committee of the township of Washington, Warren county, determining and directing that a part of certain line fence on the line between the lands of the parties should be made and maintained by the prosecutor, Emmeline Castner, and another part thereof should be made and maintained by the defendant Riegel.

Argued at November Term, 1891, before Justices SCUDDER and MAGIE.

For the prosecutrix, *William H. Morrow*.

For the defendants, *Oscar Jeffrey*.

The opinion of the court was delivered by

MAGIE, J. Prosecutrix attacks the order brought before us by this writ upon the ground that the members of the township committee were without jurisdiction to make it. Her contention is that the defendant Riegel is bound by law to make and perpetually maintain a fence along the whole of the line in question, dividing his lands from hers, and that, consequently, the provisions of the Fence act relative to the determination of the part of a division fence to be made and maintained by each of two owners bound to make and maintain it equally cannot apply.

The Fence act imposes on the owners of adjoining lands the duty of making and maintaining a just proportion of the partition fence, except such persons as shall choose to let their adjoining lands lie vacant and open. The act provides that under certain circumstances two of the township committee may determine what part of the partition fence shall be maintained by each owner; but if one of the owners is under obligation to make and maintain the whole fence, it is obvious that the statute is inapplicable, and there will be no power to divide the fence.

Such was the interpretation given to a similar law in New York. *Adams v. Van Alstyne*, 25 N. Y. 232.

It becomes necessary, therefore, to inquire whether the obligation to make and maintain the whole of the partition fence in question rests upon the defendant Riegel. The contention of prosecutrix is that he and those under whom he claims — owners of the lands adjoining hers, and separated by the fence — have, for the period of about thirty-eight years, continually amended and maintained said fence, and that thereby a right in the nature of an easement has been acquired in favor of her lands, and a duty has been imposed upon the lands now owned by him and their owners to continually amend and maintain the fence.

That an obligation to maintain partition fences might arise by pre-

-scription which could be enforced by the writ *cura claudenda* at common law, does not admit of doubt. This right was said by Gale & Whatley to be a spurious kind of easement. Gale & W. Easm. 201, 202. The easement seems to be founded upon the duty which at common law required the owner of a close, at his peril, to keep his cattle thereon, and to prevent them from trespassing on an adjoining close, and when the owner of the latter erected a fence for his protection and maintained it for the prescriptive period, he was deemed to have discharged his neighbor from his original duty and to have become bound to protect his own close by some grant or agreement, the evidence of which was lost by lapse of time. But in whatever way the right arose there can be no question that it did arise by prescription at common law. Com. Dig. Droit M. 1 & M. 2; Vin. Abr., tit. "Fences" E.; Washb. Easm. 634; *Ioins v. Acherson*, 9 Vroom, 220; *Lawrence v. Jenkins*, L. R. (8 Q. B.) 274.

Did this feature of the common law become a part of the law of New Jersey, and has it been modified or repealed by our legislation concerning fences? Those questions do not seem to have been hitherto mooted in our courts.

In other States, with similar laws, such questions have been dealt with. The earliest case is *Rust v. Low*, 6 Mass. 90, and the opinion is by Chief Justice Parsons. It was held that, since, at the original settlement of the country, no prescription to fence could exist, the common law authorizing the writ of *curia claudenda*, being inapplicable to the state of the colony, was never introduced into Massachusetts. But it was also held that, since under their statute (which closely resembles our Fence act) adjoining owners were bound to make and maintain an equal part of the division fence, and could agree upon the parts to be made and maintained by each respectively, or in default of an agreement could procure an assignment of the part each should make and maintain, and since the country had then been settled long enough to allow the time necessary to prove a prescription, and ancient assignments or agreements might have existed and been lost, a right by prescription (which at common law was presumed to stand on a lost grant) might be set up and proved by ancient usage.

The doctrine of that case was applied in *Binney v. Proprietors*, 5 Pick. 508, and approved in *Thayer v. Arnold*, 4 Metc. 589, and in *Bronson v. Coffin*, 108 Mass. 175.

Evidence that a fence was originally erected by one owner of the land it adjoined and maintained for thirty years by his grantees was held to require a presumption of an original grant or agreement establishing a division of the fence and imposing an obligation to maintain. *Knox v. Tucker*, 48 Me. 378. A charge that if the owners of land or those from whom they derived title had, for a sufficient period, severally maintained well defined portions of a division fence, each repairing a part and recognizing his obligation to do so, a division by prescription was established, was held correct. *Harlow v. Stinson*, 60 Me. 847.

A valid prescription by which an owner of land would become bound to maintain perpetually the whole of a division fence between him and an adjoining owner was recognized by Judge Denio in the New York Court of Appeals, but it was held that no obligation to maintain would be established by proof that one owner had maintained for any length of time an equal or just proportion of a division fence. *Adams v. Van Alstyne*, *ubi supra*.

In the courts of New Hampshire and Connecticut the power to acquire such a right in the maintenance of a division fence by user or prescription is denied, but in the latter State the common law obligation of owner to keep upon their own land their cattle, no longer exists. *Glidden v. Towle*, 81 N. H. 147; *Wright v. Wright*, 21 Conn. 330.

The true doctrine upon this subject, in my judgment, lies between the extremes indicated by the decisions referred to.

A right in favor of the owner of one of two adjoining tracts of land to have the division fence perpetually maintained for the whole or a specified part of the boundary line by the owner of the other tract, may undoubtedly be created by grant or agreement. Such a right is in the nature of an easement, and is a burden imposed on a servient tenement in favor of a dominant tenement.

Easements may be established by proof of a continuous, uninterrupted and adverse user in this State for that period of time which, by analogy, now suffices for what may yet be called prescription, viz., twenty years. *Lehigh Valley v. McFarlan*, 14 Vroom, 605. Such user affords in general a conclusive presumption of a lost grant.

The difficulty in applying to the case of a boundary fence the doctrine of easements acquired by user is obvious.

The common law rule respecting the protection of lands by fences has been here modified by the statute, which imposes on owners of lands lying adjacent an obligation and duty to maintain each a just proportion of a division fence. What part each should make and maintain may be fixed by their mutual agreement or by the determination of two of the township committee, made in the manner prescribed.

When for a period of over twenty years the owner of one of two adjoining tracts has continuously, without interruption and as of duty, repaired and maintained the whole of the division fence, in my judgment a presumption would arise that he or those under whom he derived title were, as owners of a servient tenement, bound to perpetually make and maintain the fence. The existence of a former and lost agreement to do so may be inferred, and no other inference would be consistent with the circumstances.

But the difficulty arises when the owner of one tract has maintained in the manner mentioned only a part of the division fence. An obligation to perpetually maintain a specific portion of such a fence may be acquired and imposed by grant or agreement. But will the continuous maintenance for twenty years of only a part of the division fence — no

grant or agreement being actually in existence — justify a presumption of an obligation to perpetually maintain that portion?

If by the statute the determination of two of the township committee fixing the portion of the division fence to be maintained by each owner is designed to fix the obligations of the owners forever without reference to subsequent changes in ownership and the introduction of new division lines, then a twenty years' maintenance of a part of the fence would justify the presumption of an obligation to maintain it, arising by an agreement or grant in respect to that part.

But such a construction of the Fence act would, in my judgment, be indefensible. The subject of the act is the boundary fence of adjoining lands of different owners. It obliges them to maintain such a fence in just proportion, to be fixed by agreement or determination of the township committee. When one of two such adjoining tracts is subdivided by grant so that the boundary of the granted tract adjoins that of the tract undivided, there arise a new subject for the operation of the act, viz., the boundary fence of adjoining lands of different owners. And since the act requires the fixing of a just proportion of fence to be maintained, it is plain that the original agreement or determination must cease to operate, to be replaced by a new agreement or determination in respect to the boundary which remains between the original owners. Any other construction would be opposed to the spirit of the act, and would produce great confusion and injustice. The construction does no violence to the language of the act.

The result is that the continued maintenance for any length of time of a part only of a division fence must be deemed to be referable, in the absence of proof of an express agreement, to an agreement or an assignment made under the statute, and no presumption will arise of a perpetual obligation to maintain that portion of the fence.

This was the conclusion arrived at in *Adams v. Van Alstyne*, *ubi supra*.

The construction given to the Fence act harmonizes with the view that the agreement of adjoining owners respecting division of the fence between them may be by parol. *Ivins v. Ackerson*, 9 Vroom, 220.

The contention of prosecutrix that defendant Riegel is shown by the evidence to be under a perpetual obligation to maintain the fence which was divided by the determination of the township committee cannot prevail.

The evidence shows that the lands of prosecutrix and Riegel adjoin for a distance of about one hundred and eighty-three perches. The fence which the committee divided extends for less than one hundred and eighteen perches. It is therefore only a part of the fence which the statute requires both adjoining owners to maintain. The proof that Riegel and those under whom he claims have continuously, and as if under duty to do so, maintained for over thirty years this part of the fence, does not establish a right in the nature of an easement for the continued maintenance thereof.

The proofs raise only a presumption that previously by agreement or determination the whole boundary line had been divided and the part which is now in question had been taken by or assigned to the owner of the land now Riegel's. Nor is this presumption affected by the fact that the part so maintained considerably exceeds the remainder of the boundary fence. The act requires each owner to make and amend a just proportion of the fence, and in declaring that it shall be equally divided requires regard to be had to the quantity of fence necessary, and other conveniences of fencing.

But the conclusion arrived at on the proofs is fatal to the jurisdiction of the township committee, for they establish either an agreement on the part of the owners of the Riegel tract to make and maintain the fence in question as the just proportion of the whole boundary fence, or a previous determination to that effect under the statutes. In either case, the committeemen had no right to act.

In my judgment, jurisdiction to make any determination in respect to this fence is also shown not to exist by the mere proof that it comprises only a part of the whole division fence between the lands of the parties. The act plainly contemplates a division of the whole fence, and neither party can invoke its aid to divide it by piecemeal.¹

SECTION IV.

EXTINGUISHMENT OF EASEMENTS.

A. *Extinguishment of Easements Otherwise than by Execution of Licenses.*

MOORE v. RAWSON.

KING'S BENCH. 1824.

[Reported 3 B. & C. 332.]

CASE for obstructing lights. Plea, not guilty. At the trial before *Hullock, B.*, at the last Spring Assizes for the county of Derby, it appeared, that the plaintiff was seised in fee of a messuage and building, with a yard, garden, and appurtenances, situate at Ripley, in that county, in the occupation of a tenant from year to year. The defendant was the owner of other messuages and premises next adjoining the

¹ On the creation by grant of an easement of fencing, and the extent of the obligation, see *Bronson v. Coffin*, 108 Mass. 175; 118 Mass. 156; *Kennedy v. Owen*, 136 Mass. 199; *Hazlett v. Sinclair*, 76 Ind. 488; *Midland Ry. Co. v. Fisher*, 125 Ind. 19; *Patten v. Patten*, 68 N. H. 603.

On the creation by prescription of other active obligations, see *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, *post*, p. 446.

plaintiffs, on the northern side thereof. The plaintiff's messuage was an ancient house, and adjoining to it there had been a building formerly used as a weaver's shop. The old shop had ancient windows, for the convenience of light to the weavers who worked looms there. About seventeen years ago the then owner and occupier of the premises took down the old shop, and erected on the same site a stable, having a blank wall next adjoining to the premises of the present defendant. This building had latterly been used as a wheelwright's shop. About three years ago, and while the plaintiff's premises continued in this state, the defendant erected a building next to the blank wall, and the plaintiff then opened a window in that wall, in the same place where there had formerly been a window in the old wall, and the action was brought for the obstruction of this new window by the building so erected by the defendant. The learned judge directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained accordingly,

Vaughan, Serjt., and *N. B. Clarke*, showed cause.

Denman and *Reader*, contra.

ABBOTT, C. J. I am of opinion that the plaintiff is not entitled to maintain this action. It appears that many years ago the former owner of his premises had the enjoyment of light and air by means of certain windows in a wall of his house. Upon the site of this wall he built a blank wall without any windows. Things continued in this state for seventeen years. The defendant, in the interim, erected a building opposite the plaintiff's blank wall, and then the plaintiff opened a window in that which had continued for so long a period a blank wall without windows, and he now complains that that window is darkened by the buildings which the defendant so erected. It seems to me that, if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show, that at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual, but a temporary abandonment of the enjoyment, and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burden of showing that lies on the party who has discontinued the use of the light. By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect. For these reasons I am of opinion, that the rule for a nonsuit must be made absolute.

BAYLEY, J. The right to light, air, or water, is acquired by enjoyment, and will, as it seems to me, continue so long as the party either continues that enjoyment or shows an intention to continue it. In this case the former owner of the plaintiff's premises had acquired a right to

the enjoyment of the light; but he chose to relinquish that enjoyment, and to erect a blank wall instead of one in which there were formerly windows. At that time he ceased to enjoy the light in the mode in which he had used to do, and his right ceased with it. Suppose that, instead of doing that, he had pulled down the house and buildings, and converted the land into a garden, and continued so to use it for a period of seventeen years; and another person had been induced by such conduct to buy the adjoining ground for the purposes of building. It would be most unjust to allow the person who had so converted his land into garden ground, to prevent the other from building upon the adjoining land which he had, under such circumstances, been induced to purchase for that purpose. I think that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and that it is a wholesome and wise qualification of that rule to say, that the ceasing to enjoy destroys the right, unless at the time when the party discontinues the enjoyment he does some act to show that he means to resume it within a reasonable time.

HOLROYD, J. I am of the same opinion. It appears that the former owner of the plaintiff's premises at one time was entitled to the house with the windows, so that the light coming to those windows over the adjoining land could not be obstructed by the owner of that land. I think, however, that the right acquired by the enjoyment of the light, continued no longer than the existence of the thing itself in respect of which the party had the right of enjoyment, — I mean the house with the windows; when the house and the windows were destroyed by his own act, the right which he had in respect of them was also extinguished. If, indeed, at the time when he pulled the house down, he had intimated his intention of rebuilding it, the right would not then have been destroyed with the house. If he had done some act to show that he intended to build another in its place, then the new house, when built, would in effect have been a continuation of the old house, and the rights attached to the old house would have continued. If a man has a right of common attached to his mill, or a right of turbary attached to his house, if he pulls down the mill or the house, the right of common or of turbary will *prima facie* cease. If he show an intention to build another mill or another house, his right continues. But if he pulls down the house or the mill without showing any intention to make a similar use of the land, and after a long period of time has elapsed, builds a house or mill corresponding to that which he pulls down, that is not the renovation of the old house or mill, but the creation of a new thing, and the rights which he had in respect of the old house or mill, do not in my opinion attach to the new one. In this case, I think, the building of a blank wall is a stronger circumstance to show that he had no intention to continue the enjoyment of his light than if he had merely pulled down the house. In that case he might have intended to substitute something in its place. Here, he does in fact substitute quite a different thing, — a wall without windows. There is not only nothing

to show that he meant to renovate the house so as to make it a continuance of the old house, but he actually builds a new house different from the old one, thereby showing that he did not mean to renovate the old house. It seems to me, therefore, that the right is not renewed as it would have been if, when he had pulled down the old house, he had shown an intention to rebuild it within a reasonable time, although he did not do so *eo instanti*.

LITLEDALE, J. According to the present rule of law a man may acquire a right of way, or a right of common (except, indeed, common appendant) upon the land of another, by enjoyment. After twenty years' adverse enjoyment the law presumes a grant made before the user commenced, by some person who had power to grant. But if the party who has acquired the right by grant ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right. It is said, however, that as he can only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period; and that as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user, to raise a presumption of a release. And this reasoning, perhaps, may apply to a right of common or of way. But there is a material difference between the mode of acquiring such rights and a right to light and air. The latter is acquired by mere occupancy; the former can only be acquired by user, accompanied with the consent of the owner of the land; for a way over the lands of another can only be lawfully used, in the first instance, with the consent, express or implied, of the owner. A party using the way without such consent would be a wrongdoer; but when such a user, without interruption, has continued for twenty years, the consent of the owner is not only implied during that period, but a grant of the easement is presumed to have taken place before the user commenced. The consent of the owner of the land was necessary, however, to make the user of the way (from which the presumption of the grant is to arise) lawful in the first instance. But it is otherwise as to light and air. Every man on his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He therefore begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building the owner of the adjoining land may, afterwards, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbor. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction,

so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant; for although a right of common (except as to common appendant) or a right of way being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant, yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air. The right, therefore, is acquired by mere occupancy, and ought to cease when the person who so acquired it discontinues the occupancy. If, therefore, as in this case, the party who has acquired the right once ceases to make use of the light and air, which he had appropriated to his own use, without showing any intention to resume the enjoyment, he must be taken to have abandoned the right. I am of opinion, that as the right is acquired by mere user, it may be lost by non-user. It would be most inconvenient to hold, that the property in light and air, which is acquired by occupancy, can only be lost where there has been an abandonment of the right for twenty years. I think, that if a party does any act to show that he abandons his right to the benefit of that light and air which he once had, he may lose his right in a much less period than twenty years. If a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does anything to show that he did not mean to convert the land to a different purpose, then his right would not cease. In this case, I think that the owner of the plaintiff's premises abandoned his right to the ancient lights, by erecting the blank wall instead of that in which the ancient windows were; for he then indicated an intention never to resume that enjoyment of the light which he once had. Under those circumstances, I think that the temporary disuse was a complete abandonment of the right.

*Rule absolute.*¹

¹ See *Stokoe v. Singers*, 8 E. & B. 31; *Ecclesiastical Commissioners v. Kino*, 14 Ch. Div. 213; *Taylor v. Hampton*, 4 McCord, 96; *Hayford v. Spokesfield*, 100 Mass. 491.

"ERLE, J. In *Moore v. Rawson* it seems to be said that an intention to abandon [the easement] permanently destroys it, unless a contrary intention be manifested within a reasonable time, which is not defined. I should feel inclined to say that the intention permanently to abandon it would destroy it as soon as it was communicated to the owners of the servient tenement, without the lapse of any time. LORD CAMPBELL, C. J. I doubt whether the communication of that intention destroys the right until the communication is acted upon. Then it certainly does." *Stokoe v. Singers*, 8 E. & B. 31, 37 (1857).

"A right of way or a right to light may be abandoned, and it is always a question of fact to be ascertained, sometimes by a jury, and sometimes by this court, from certain circumstances, whether the act was itself an abandonment or intended to be so. If in this case the defendants had commenced building before this door had

THOMAS v. THOMAS.

EXCHEQUER. 1835.

[Reported 2 C. M. & R. 84.]

CASE. — The declaration¹ stated that the plaintiff was possessed of a certain dwelling-house, yard, and premises, and of a thatched wall upon those premises, and that by reason of such possession, plaintiff was entitled to the use and benefit of a drain, leading from the dwelling-house through the yard of the plaintiff and into premises nearby in the possession of the defendant. The plaintiff further declared that by reason of the possession of her premises, she was entitled to the easement of having the eaves and thatch of the wall upon her premises extend a convenient space over the premises of the defendant, together with an easement of eavesdrip from the wall and thatch. The declaration then alleged that defendant obstructed the drain, and, by means of erections and buildings, prevented the dripping of rain-water, to the damage of the plaintiff. The defendant pleaded, first, not guilty; secondly, a denial of the plaintiff's alleged right of drainage; thirdly, a denial of the plaintiff's alleged easements to have the eaves and wall extend over the defendant's premises and of eavesdrip. Upon these pleas issue was joined.

At the trial before *Patteson, J.*, at the last assizes for the county of Devon, the following appeared to be the facts of the case: Joseph Thomas, the father of the defendants, being seised in fee of the land and premises occupied by the defendants at the time of the alleged injury, purchased the adjoining premises occupied by the plaintiff at the time of the alleged injury, in which there was a term of 500 years. By his will, dated the 18th April, 1816, the former property was devised to his wife for life, with remainder in fee to his son John

been reopened, I should have been of opinion that the plaintiff had, by allowing it so to remain closed, shown that he intended to abandon his right, and that in that event he could not have sustained his bill. Now this distinctly appears by the case of *Moore v. Rawson*, an analogous case, and a very valuable authority, where the plaintiff having ancient windows pulled down the wall in which they were, and erected a blank wall, and allowed it so to remain for seventeen years, during which period the defendants erected buildings which they could not have done if the windows had remained, and incurred expenses. Lord Tenterden, in the Court of Queen's Bench, held that the plaintiff could not maintain an action, and directed a nonsuit. But it is clear that if there had been no building erected before the expiration of the seventeen years, the plaintiff might have resumed his windows and gained a new right of action." *MALINS, V. C.*, in *Cook v. Mayor of Bath*, 18 L. T. R. 123, 125 (1868).

See *Ecclesiastical Commissioners v. Kino*, 14 Ch. Div. 213; *Taylor v. Hampton*, 4 McCord, 96; *Hayford v. Spokesfield*, 100 Mass. 491; *Canny v. Andrews*, 123 Mass. 155; *Snell v. Levitt*, 110 N. Y. 595.

¹ The pleadings are abbreviated.

Vicary Thomas, one of the defendants; and the latter property was bequeathed for the residue of the term of 500 years to his wife for life, and afterwards to his son William, the husband of the plaintiff. Joseph Thomas died on the 28th May, 1820, having made Abraham Wreyford the trustee under his will, in whom the legal estate in all the property vested.

The defendants for some time after the death of their father, occupied the premises in question as tenants from year to year; but, on the 10th of April, 1834, a lease of those premises was granted by Mrs. Thomas, the mother of the defendants, and by Wreyford, to the defendant John Vicary Thomas for sixty years, in case Mrs. Thomas should so long live. Both the defendants continued to carry on their business upon the premises. The plaintiff was in the actual possession of the other premises held for the residue of the term of 500 years, having been put into possession by Wreyford in the month of May, 1834. It appeared, that at one period of time after the death of Joseph Thomas the testator, and before the lease to the defendant John Vicary Thomas, Wreyford the trustee was in possession of both the premises.

The situation of the respective premises with regard to the drain did not become material, the defendants admitting the obstruction, and contesting the plaintiff's right to the easement. With regard to the claim of easement for the eaves-dropping it appeared, that, about thirteen years since, the top of the plaintiff's wall was covered with pantiles, which projected several inches; but that upon the buildings being accidentally burnt, the wall was thatched, and the thatch projected some inches further than the pantiles had done. On this occasion, also, the wall was raised about three feet. The obstruction of the eaves-dropping was caused by the defendants building a wall close up to the wall of the plaintiff, within the space over which the pantiles had formerly projected, and within the projection of the thatch.

The existence of the easements in question for the period of upwards of twenty years was proved, and the obstruction of the plaintiff in the user of them was admitted; but, it was insisted for the defendants, that the right to the easements was determined by the unity of possession of the premises in Wreyford the trustee. It was likewise insisted with regard to the eaves-dropping, that by the alteration made by the plaintiff in the height of the wall and the substitution of the thatched for the tiled roof, the right to that easement had ceased. The jury having found a verdict for the plaintiff with 40*s.* damages, the learned judge gave the defendants leave to move upon the first objection to enter a nonsuit.

Erle now moved accordingly, or for a new trial. First, with regard to the easement of eaves-dropping. Where a party claims an easement, he cannot vary his mode of exercising his right; if he does so, that right ceases. The exercise of an easement is an infringement upon the right of another, and must be strictly pursued. Thus, a per-

son who has a right of way for a particular purpose, cannot use it for another purpose; as where he possesses a right to carry corn or manure, that will not justify him in carrying lime, or the produce of a quarry. *Jackson v. Stacey*, Holt, N. P. C. 455. See *Saunders v. Newman*, 1 B. & A. 258. Here, if the plaintiff had a right to raise the wall three feet, she had a right to raise it to any indefinite height; and if she could extend the projection of the roof four inches, why might she not extend it further, whatever inconvenience it might prove to be to the defendants? The alteration in the enjoyment of the right destroyed it, and the defendants were justified in building up their wall, as they would have been in case no easement whatever had existed. [Alderson, B. How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim? It has been held in the case of lights, that where a party enlarges an ancient window, the owner of the adjoining land cannot obstruct any part of the light which ought to pass through the space occupied by the ancient window. *Chandler v. Thompson*, 3 Campb. 80; *Martin v. Goble*, 1 Campb. 322; *Luttrell's case*, 4 Rep. 87 a. If the act of the defendants is injurious to the plaintiff's original right, it is not the less so, because it is injurious also to a further right which the plaintiff claims.] If the wall is altered in height or extent, the right claimed ceases to be what it was. [Alderson, B. The only difference is, that since the alteration the drops have to fall from a greater height. How can that be in any degree prejudicial to the defendants?] Secondly, the easements were extinguished by the unity of possession in Wreyford, the trustee. It is a rule of law, that whenever the land upon which an easement is claimed and the land in respect of which it is claimed are united in one person, the easement must cease; for no one can claim a right as against himself. Here, then, as soon as the possession of the whole premises was vested in Wreyford, the easements ceased to exist; and the plaintiff and the defendants took their respective premises in the same manner as Wreyford held them, viz. discharged from the easement. With regard to a right of way, it has been held, that unity of possession of the land in respect of which the way is claimed, and the land over which it passes, will extinguish the right, for the prescription is gone, and the way is against common right. 1 Rol. Ab. 935, Vin. Ab. Extinguishment (A.) (C.).

LORD ABINGER, C. B. The union of possession in the trustee did not extinguish the easement, but only suspended it during that unity of possession; and upon his parting with the premises to different tenants, the right revived. The verdict is correct, and ought not to be disturbed.

BOLLAND, B., concurred.

ALDERSON, B. If I am seised of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands, the easement is neces-

sarily suspended, but it is not extinguished, because there is no unity of seisin; and if I part with the premises, the right, not being extinguished, will revive. That was the case here.

GURNEY, B., concurring.

*Rule refused.*¹

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WARD v. WARD.

EXCHEQUER. 1852.

[Reported 7 Ex. 838.]

TRESPASS for breaking and entering two closes of the plaintiff, with horses, carts, &c.

The defendant pleaded, first, Not guilty. Secondly, that he was seised of a close called the Stubbing Pits; and he then prescribed for an immemorial right of way over the closes in question to and from the Stubbing Pits, and for the occupation thereof. Thirdly and fourthly, forty and twenty years' user respectively of such right of way, under the Prescription Act, 2 & 3 Will. 4, c. 71. The plaintiff joined issue on the first plea, and traversed the rights respectively set up in the other pleas; and he also new assigned for trespasses committed *extra viam*; to which new assignment the defendant pleaded Not guilty; and issue was joined thereon.

At the trial, before *Jervis*, C. J., at the last Derbyshire Assizes, it appeared that the defendant was the owner of the close called the Stubbing Pits, and that in former times the owners of that close were entitled to use, and did use, the disputed way in question; but that, in point of fact, the user had not been exercised from the year 1814 up to the time of the alleged trespasses. During this interval the plaintiff himself held the Stubbing Pits, with other land; and then a tenant named Bishop held it, and paid an acknowledgment to the plaintiff for using a different means of access; and then another tenant held it for twenty-six years, during all which time he made no use of the way in question, because he had other lands of his own adjoining the Stubbing Pits, which furnished him with a shorter and more convenient way to and from the Stubbing Pits; but, in order to prevent any question arising as to a right being acquired on his own land, he regularly obtained an allowance of 1s. out of his rent as an acknowledgment for the use of the way over his own land. Under these circumstances a verdict was entered for the plaintiff with 40s. damages, with leave to the defendant to move to enter a verdict for him upon the issue raised by the second plea.

A rule *nisi* having been obtained accordingly,

Hayes (with whom was *Deighton*) showed cause. The disuse of the right of way for upwards of twenty years amounts to an abandonment

¹ See *Rex v. Inhabitants of Hermitage*, Carth. 289; *Ritger v. Parker*, 8 Cush. 146; *White's Bank v. Nichols*, 64 N. Y. 65; *Dority v. Dunning*, 78 Me. 381.

of the right. The defendant has therefore lost the right of way which originally belonged to the Stubbing Pits. This is a right which may be presumed from a continued user, and by non-user the right may be presumed to have been given up: *Moore v. Rawson*, 3 B. & C. 332. Littledale, J., there says: "After twenty years' adverse enjoyment the law presumes a grant made before the user commenced, by some person who had power to grant. But if the party who has acquired the right by grant, ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right." [ALDERSON, B. The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user. Here the owners of the Stubbing Pits did not use the way in question, for the simple reason that they had a more easy and convenient means of access to that part of their property. If the owner of that close were now precluded from recovering the original right, he would be without the means of any access to his property. POLLOCK, C. B. It is a question of fact, and one which could only be found one way. The only inference that could reasonably be drawn from the non-user by this party is, that he had no occasion for it.]

Macaulay and Brewer, in support of the rule, were not called upon.

PER CURIAM.¹ The rule must be absolute.

*Rule absoluta.*²

HARVEY v. WALTERS.

COMMON PLEAS. 1873.

[Reported L. R. 8 C. P. 162.]

THE third count of the declaration alleged that the plaintiff was entitled to a right of having rain-water drop from the eaves of certain roofs on the plaintiff's land on to the defendant's land adjoining, and of having the eaves of such buildings project over the defendant's land, and complained that the defendant wrongfully removed the said eaves and built upon the said land close to and higher than the said roofs, so as to prevent the said eaves from projecting over the said land, and the rain water from dropping from the said eaves on the said land, &c.

Fourth count for negligence by the defendant in erecting certain buildings in close proximity to buildings of the plaintiff, so that the

¹ POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

² See *accord. Seaman v. Vaudrey*, 16 Ves. 390, a case of a profit; *Lovell v. Smith*, 8 C. B. (N. S.) 120. See *Crossley v. Lightowler*, L. R. 2 Ch. 478, 482; *White's Bank v. Nichols*, 64 N. Y. 65.

walls and roof of the plaintiff's buildings were injured and the spouts for carrying off the rain-water from the said roof were damaged.

Pleas (*inter alia*): Third plea to the third count denying that the plaintiff was entitled as alleged.

Fifth plea to the fourth count alleging that the plaintiff had wrongfully placed the spouts and part of the roof of plaintiff's buildings, so that they overhung defendant's land, wherefore defendant removed the same, doing no unnecessary damage, &c.

Issues.

At the trial before *Quain, J.*, at the Nottingham Spring Assizes, the facts appeared to be as follows: The plaintiff and defendant were owners of adjoining properties, and it was not denied that the plaintiff had become entitled by user to a right of having the eaves of buildings on his land project over the defendant's land; but the plaintiff had some short time before the action pulled down the buildings that had formerly stood on his land, and rebuilt them, and in so doing had carried the wall on which the projections had been to a greater height than the old building, and so increased the height of the eaves from the ground by three or four courses of bricks. There was no alteration in the character of the eaves save the slightly increased height, nor was there anything to show that the water fell from the eaves in a different manner from that in which it had previously fallen so as to render the servitude more onerous. The defendant had thereupon removed some of the spouting of plaintiff's building and put back the eaves to make room for buildings which she erected on her own land. On these facts the verdict was entered for the plaintiff for 40s., leave being reserved to move to enter it for the defendant on the ground that the plaintiff had lost his right to have his eaves project over defendant's land by raising his roof.

A rule *nisi* having been accordingly obtained,
Field, Q. C., and *Kennedy*, showed cause.
Cave and *J. C. Lawrence*, supported the rule.

Our. adv. vult.

The judgment of the court (*BOVILL, C. J.*, *GROVE* and *DENMAN, JJ.*) was delivered by

GROVE, J. This action was tried before *Quain, J.*, at the Nottingham Spring Assizes, 1872, when a verdict was found for the plaintiff, subject to a point reserved upon the 3d count of the declaration, which was for an interference with a right of eavesdropping from a roof of the plaintiff upon the defendant's premises. A rule was subsequently obtained by *Mr. Cave*, on the part of the defendant, to enter the verdict for her upon the issues on this point, on the ground that plaintiff, by raising his roof, had lost the right to project his eaves and gutter over the defendant's land, and that is the only point which is open to the defendant on the present rule. The question was reserved at the trial, in order to enable the defendant to take the opinion of the court upon the point raised in *Thomas v. Thomas*, 2 C. M. & R. 84. But for the

alteration the right to the easement was established by the evidence and the verdict of the jury. In 1867 the plaintiff made some alteration in his building by which the eaves were raised higher by three or four courses of bricks, but the extent of projection of the eaves remained as before the alteration. Things being in this state, the defendant shortly before the time of the action removed some spouting, and put back the eaves to make room for some buildings which she erected, and thereby damaged the plaintiff by causing the water which had flowed off to percolate into crevices, and obliging him to construct a new gutter along the roof. It was contended by Mr. Cave, on behalf of the defendant, that by the change in the position of the eaves in 1867, the mode of enjoyment was changed and the easement destroyed. Mr. Field, on the other hand, contended, on the authority of *Thomas v. Thomas*, that there being no substantial variance in the enjoyment, the right to the easement was not affected. In that case, which was very similar to the present, and not distinguishable in principle from it, it was held that the raising a wall about three feet, from which water dropped on the servient tenement, and also slightly increasing the projection by substituting thatch for pantiles, did not destroy the easement. It was, however, argued by Mr. Cave that, on the principle of *cujus est solum ejus est usque ad cælum*, there was a trespass in this case which the person trespassed on had a right to abate. Mr. Field, *contra*, contended that the point did not arise upon the rule, and that in the case of *Pickering v. Rudd*, 4 Camp. 219, Lord Ellenborough held, that for nailing a board so as to overhang the plaintiff's close the proper remedy was case and not trespass; and, assuming the point as to trespass to be open to the defendant upon this rule, which was granted only on the point reserved at the trial, the original projection would seem to be the real trespass, and the projection above it a mere user of the space taken possession of by such trespass. The real and indeed the only point reserved, however, was whether the easement was destroyed by the alteration. It is difficult to see how the mere raising of the eaves, which would, if anything, cause the water falling from them to become more dispersed, could affect injuriously the defendant's property. No real difference was pointed out to us in the effect of the slight raising of the height of the eaves. It did not appear that any greater burden was thereby cast upon the servient tenement, and in the civil law it was considered that the raising of the eaves diminished instead of increasing the burden of the *servitus* in the passage cited by Mr. Field.

It appears to us that to hold that any, even the slightest, variation in the enjoyment of an easement would destroy the easement, would virtually do away with all easements, as by the effect of natural causes some change must take place. Thus water percolating or flowing would produce some wear and tear, and alter the height or width of the conduit; so would weather, alternations of heat and cold, &c. In the case of ancient lights, changes in the transparency of glass, wear and tear of frames, growth of shrubs, &c., would produce effects which

would vary the character of the enjoyment. In the user of a footpath the footsteps would never be on the same line, or confined accurately to the same width of road. We are of opinion that the question here, as in *Hall v. Swift*, 4 Bing. N. C. 381, and other cases, is, whether there has been a substantial variance in the mode of or extent of user or enjoyment of the easement, so as to throw a greater burden on the servient tenement. In the language of Sir Richard Kindersley, which was adopted by the Master of the Rolls in the late case of *Heath v. Bucknell*, Law Rep. 8 Eq. at p. 5, there must be an additional or different servitude, and the change must be material either in the nature or in the *quantum* of the servitude imposed. It was not suggested, nor was there any evidence that any such additional burden had been cast upon the defendant's premises by the alteration in this case, and therefore we are of opinion that the defendant is not entitled to have the verdict entered in her favor upon the issues in question, and that the present rule must be discharged. *Rule discharged.*¹

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PRATT v. SWEETSER.

SUPREME COURT OF MAINE. 1878.

[Reported 68 Me. 314.]

ON exceptions from the Superior Court.

Trespass *quare clausum*.

The defendant set up a right of way over the *locus in quo*, which was the upland mowing field of the plaintiff, for taking off marsh hay from his marsh adjoining the premises on which the trespass was alleged to have been committed, and introduced evidence tending to show that such right of way had been acquired by him and those under whom he claimed, by prescription.

The plaintiff claimed that there had never been an adverse or continuous use of the way in question for said purpose, for twenty consecutive years, and introduced evidence tending to show non-user, an abandonment and an interruption of use of the way, and that the line of travel over which the hay had been taken off was not the same each year.

¹ See *Lewis v. New York & Harlem R. R. Co.*, 162 N. Y. 202, 227, 229 (1900).

Questions analogous to that in *Harvey v. Walters* have arisen in England most frequently with regard to the easement of light. The cases are collected in Gale, *Eas.* (7th ed.) 497 *et seq.* See also *City Nat. Bank v. Van Meter*, 59 N. J. Eq. 32; *Douglas & Kissane v. Coonley*, 156 N. Y. 521; *Hottell v. Farmers' Protective Ass'n*, 25 Col. 67.

A way by necessity is extinguished when the necessity ceases. *Holmes v. Goring*, 2 Bing. 76. *Holmes v. Goring* was doubted in *Proctor v. Hodgson*, 10 Ex. 824, 828, but its principle is generally followed in America. See Jones, *Eas.* § 334.

On the effect of misuse or excessive use of an easement, see *Masonic Temple Ass'n v. Harris*, 79 Me. 250, 258; *Roberts v. Roberts*, 65 N. Y. 275; *McMillan v. Cronin*, 75 N. Y. 474.

The presiding justice instructed the jury as in the opinion appears; and the defendant alleged exceptions.

M. P. Frank and *P. J. Larrabee*, for the defendant.

A. A. Strout and *G. F. Holmes*, for the plaintiff.

VIRGIN, J. The defence set up was a prescriptive right of way across the *locus*. To this the plaintiff replied that, if the defendant had acquired such a right, he subsequently lost it by abandonment. Upon this point the presiding justice instructed the jury as follows:

"The question is whether, at any period in the past, the owners of the marsh, by such use as I have described, had obtained a right of way by prescription. Such a right of way, if once obtained, would continue until it was voluntarily abandoned with an intention to abandon it, or until it had ceased to be used for a period of twenty years.

"If you should find at some time there was such a right of way, then, upon the question whether it continued or not down to the trespass, this would be the rule. It could be destroyed in two ways; and these two ways are all it is necessary for me to consider. First, by voluntary abandonment of it. If at any time the owners of the marsh had another right of way and gave up this right of way with the intention to abandon it, if that is proved, their right would cease at once. On the other hand, if there is no proof of that, notwithstanding they did not intend to abandon, but did not use it, then that non-user must continue for twenty years before the right by prescription fails. Having once obtained a right of way, they may abandon it at any time they see fit, and if the intention is proved, that is the end of it; or if they cease to use it for twenty years, then their right terminates in that way."

By giving this unqualified statement as to the effect of non-user, though some of the authorities sustain it, we think the learned judge erred. For, even if, as suggested by some of the authorities, there is any sound distinction between easements created by deed and those acquired by prescription, the right is not necessarily lost by mere non-user for twenty years. The better doctrine seems to be that non-user for the period mentioned is evidence of an intention to abandon; but it is open to explanation, and it may be controlled by evidence that the owner had no such intention while omitting to use it. *Wash. Easements*, 673; 3 *Kent Com.* (12th ed.) 449, and notes; *Farrar v. Cooper*, 84 *Maine*, 394.

Exceptions sustained. New trial granted.

APPLETON, C. J., WALTON, BARROWS, PETERS, and LIBBEY, JJ., concurred.¹

¹ See *accord. Seaman v. Vaudrey*, 16 *Ves.* 390, a case of a profit; *Lowell v. Smith*, 3 *C. B. (N. S.)* 120; *Ward v. Ward*, 7 *Ex.* 838. See *Crossley v. Lightowler*, *L. R.* 2 *Ch.* 478, 482; *White's Bank v. Nichols*, 64 *N. Y.* 65; *Raritan Water Power Co. v. Veghte*, 6 *C. E. Green*, 463, 480.

In Massachusetts, New Hampshire, New York, and Pennsylvania it has been held that an easement or profit created by deed cannot be extinguished by mere non-user, in contradistinction to an easement created by prescription, which, it is said, can be

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STEERE v. TIFFANY.

SUPREME COURT OF RHODE ISLAND. 1882.

[Reported 13 R. I. 568.]

TRESPASS on the case. Heard by the court, jury trial being waived.

This action was trespass on the case for obstructing a right of way over the small triangle of land marked i, k, l, on the accompanying plat. The plaintiff and the defendant both derived title from the same proprietor, and their lots extended by the descriptions of their deeds to the middle line of the way b, a, c, d, the way being laid out and platted for the common use of all the lot owners on the plat. After all the platted lots had been sold, the city of Providence laid out the area enclosed by the lines f, e, h, g, as a public highway, called Summer Street. Subsequently the owner of lot No. 5 obstructed the triangle marked l, i, k, and the owner of lot No. 13 thereupon brought this action.

DURFEE, C. J. The only defence set up by the defendant is, that the way which he is sued for obstructing had been lost before obstruction by renunciation or abandonment. It is well settled that an easement may be so lost, though where the only proof of it is cesser of

lost by non-user. *Arnold v. Stevens*, 24 Pick. 106; *Bannon v. Angier*, 2 All. 128; *Owen v. Field*, 102 Mass. 90, 114; *Barnes v. Lloyd*, 112 Mass. 224; *Howard v. Britton*, 67 N. H. 484; *Smyles v. Hastings*, 22 N. Y. 217, 224; *Wiggins v. McCleary*, 49 N. Y. 846; *Nitzell v. Paschall*, 3 Rawle, 76. See *Lindeman v. Lindsey*, 69 Pa. 98; *Erb v. Brown*, ib. 216; *Bombaugh v. Miller*, 82 Pa. 203. But it has never been decided in either of these States that an easement gained by prescription can be lost by mere non-user. See Angell on Watercourses (7th ed.), § 252, note; *Veghte v. Raritan Water Power Co.*, 4 C. E. Green, 142, 156. Nor has it been held that an easement acquired by deed cannot be lost by abandonment without adverse possession. *Quere de hoc*.

"The neglect of the grantee to enjoy the easement would be no more significant in its bearing upon his rights than the neglect to enjoy the freehold to which the easement was appurtenant." *COOLEY, J.*, in *Day v. Walden*, 46 Mich. 575, 583 (1881). And see *Welsh v. Taylor*, 184 N. Y. 450, 460.

"If the jury were satisfied that there was a proprietors' way over the land of the plaintiff, originally used and enjoyed for general purposes by the adjoining owners of the land, such right would not be restricted or impaired because the owners of the easement had had occasion to use it only for taking hay off the premises. Such use was all that was necessary or useful while their estates were unoccupied or unimproved, and no access was required to them except to take off the annual crop of grass. But it was no evidence of an intent on their part to abandon the right to use the way for other purposes when it might become useful or expedient so to do; and the jury would not be warranted in inferring from such non-user any relinquishment or abandonment of the original right to use the way as a means of access to the premises adjoining, without restriction or limitation." *BIGLOW, J.*, in *Holt v. Sergeant*, 15 Gray, 97, 102 (1860). Cf. *Quigley v. Baker*, 160 Mass. 303, 306.

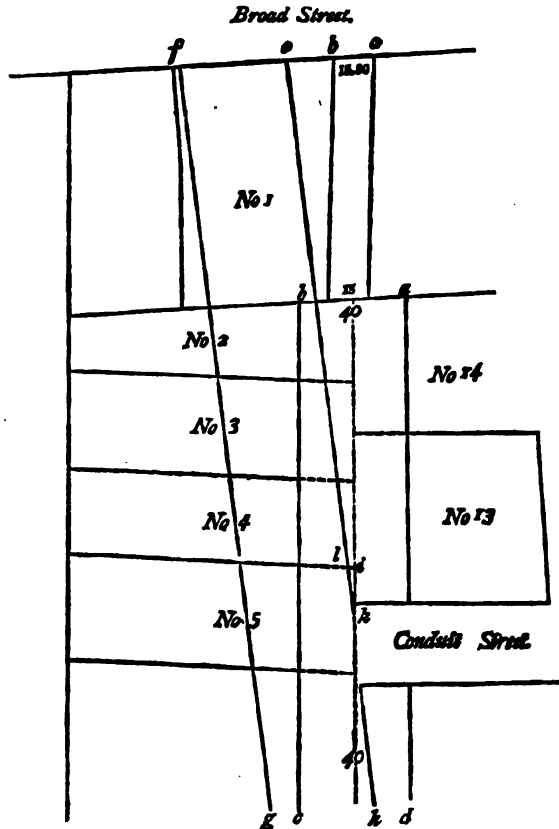
Where land is subject to easements of passage, light, and air, the first of these easements may be extinguished by adverse user, leaving the others in existence in part. *Dill v. Board of Education*, 47 N. J. Eq. 421, 438 (1890).

use, the cesser of use must have continued for at least twenty years. Where, however, there is other proof showing clearly an intent to renounce or abandon, the easement may be lost in a much briefer time. Thus where A. had an easement of light in the land of B., enjoyed by means of a window opening in an ancient wall of his house, which he pulled down and rebuilt without the window, it was held, after seventeen years, B. meanwhile having built so as to intercept the light, that the easement had been abandoned and lost. *Moore v. Rawson*, 3 B. & C. 332. See also *Liggins v. Inge*, 7 Bing. 682; *Pope v. Devereaux*, 5 Gray, 409; *Canny v. Andrews*, 123 Mass. 155. It is not, it has been said, so much the duration of the cesser as the nature of the act done by the owner of the easement, or of the adverse act acquiesced in, and the intention which the one or the other indicates, that is material. *Regina v. Chorley*, 12 Q. B. 515, 519. Where A., having a way leading from his house and barn on his own land to the highway over the land of B., removed house and barn, ploughed and planted the land, and fenced up the end of the way, it was held, twelve years after the removal of the house, that the way had been renounced and lost. *Crain v. Fox*, 16 Barb. S. C. 184. The case of *Corning v. Gould*, 16 Wend. 531, is still more like the case at bar. There the parties owned adjoining lots, with a private way for their common use along the dividing line, which was the centre of the way. The plaintiff, four or five years before suit, built a house on his lot which encroached on the way, and then ran a fence through the centre, thus taking half to himself and leaving the other half to the adjoining owner, who sold to the defendant. The defendant proceeded to occupy a part of his half with a house. The court held that the way had become extinct, the acts of both parties being incompatible with its continuance. In *Dyer v. Sanford*, 9 Met. 395, Chief Justice Shaw declared that, to prove an abandonment, it was only necessary to show that the acts relied on were done by the owner in fee of the dominant tenement, and were of such a character as to show decisively an intent to abandon. And see *Taylor v. Hampton*, 4 McCord, 96; 3 Kent Comment. 352; Washburn on Easements and Servitudes, *542-*549.

In the case at bar the way, considered as a private way, was created for the common use of the owners, whose opposite lots met in the centre of it subject to the easement. After the lay out of Summer Street diagonally across the way, the plaintiff or his predecessor in title took exclusive possession of the half in front of his lot by moving his house forward. His next neighbor did likewise. The owner of the lot on which was the gangway leading from the way to Broad Street closed the gangway. These acts were all done without objection. The result is that the way as originally established has practically ceased to exist; and when the defendant, following the plaintiff's example, took possession of the small bit of the way lying between the plaintiff's lot and Summer Street, he thereby unmistakably signified his consent to its destruction. The plaintiff, in suing him, is suing for

an obstruction, not of the way as created, but of a mere bit of it, which is convenient for his individual use, but which, partly in consequence of his own acts, is no longer capable of being used as originally intended. Can he maintain his action? We think not. The way, if it ever existed as a private way, so existed by implication or estoppel, not by express grant.

To ascertain its character, therefore, we must look to the circumstances of its creation; and doing so, we think it is manifest that the way was intended to exist as a whole, and not in halves, and that consequently to take away either half is to destroy it, and the party taking must be held to have renounced or abandoned his right in the other half. The case in this aspect is almost identical with *Corning v. Gould*, of which the court, in *Crain v. Fox*, remarks, that the fence erected in the centre of the way was an unequivocal



Lines a, b, c, d, show the original lay-out of the way in question.
Lines e, f, g, h, show the position of Summer Street.
Lot 13 is the plaintiff's estate.
Lot 5 is the defendant's estate.
Lines i, k, l, show the land in dispute.

act of renunciation, for the plain reason that the use of the way in common was rendered impossible by it. We do not see how it is possible for us to hold in the case at bar that the defendant is liable, without also holding implicitly that the way as originally established still exists, and that the plaintiff is liable likewise for obstructing it. This result, however, the plaintiff disavows, and his disavowal must be taken conclusively against him as a renunciation of the easement.

The plaintiff has access to the public street otherwise than over the defendant's land, and it is therefore unnecessary to inquire if he could,

in the circumstances, maintain his action if he were claiming the way as a way of necessity. We give the defendant judgment for costs.

*Judgment for defendant.*¹

Charles H. Parkhurst and Charles L. Steere, for plaintiff.

Perce and Hallett, for defendant.

B. Licenses.

NOTE.— One mode, as will be seen, of extinguishing an easement, is by the owner of the dominant tenement granting to the owner of the servient tenement a license to create a state of things inconsistent with the existence of the easement, and by the owner of the servient tenement acting upon the license. In this place have been put the cases illustrating the revocability or irrevocability of licenses, although some of them relate to the creation and not to the extinction of rights; for the development of the law on the subject has taken such a course that it is instructive, if not necessary, to bring the whole subject of licenses together.

FENTIMAN v. SMITH.

KING'S BENCH. 1803.

[*Reported 4 East, 107.*]

In an action on the case for diverting a watercourse from the plaintiff's mill, the declaration stated that whereas the plaintiff on the 1st of January, 1803, and long before, was and still is *lawfully possessed of a certain cotton mill, with the appurtenances*, situate at Addingham, in the county of York, near to two certain rivulets there called the Town Beck and the Back Beck, the water of which rivulet called the Back Beck until the interruption complained of had flowed into and still of right ought to flow into the Town Beck by means of a certain tunnel or goit there above the plaintiff's weir there erected across the Town Beck a little above the said mill; and the plaintiff *by reason of his possession of the said mill*, during all the time of working the same, of right ought to have had, and still of right ought to have, the use and benefit of both the said rivulets called the Town Beck and Back Beck: yet the defendant, knowing the premises, and to deprive the plaintiff of part of the use and benefit of his said mill with the appurtenances, whilst the plaintiff was so possessed thereof as aforesaid at, &c., cut a channel, &c., whereby the water of the Back Beck was diverted from running into the said tunnel or goit, and so to the mill, and the plaintiff was prevented from working his said mill, &c.

¹ And see *Dillman v. Hoffman*, 38 Wis. 550; *Monaghan v. Memphis Fair Co.*, 95 Tenn. 108. Cf. *White's Bank v. Nichols*, 64 N. Y. 65.

At the trial before *Rooke, J.*, at the last assizes at York, it appeared in evidence that the tunnel or goit which was made and fixed into the ground with stone work, had been made in part over an old road purchased by the defendant about eight years ago for a guinea, who at that time agreed for the same price to let the plaintiff lay the tunnel there for the purpose of conveying the water to the mill; that the defendant even assisted at the making of the tunnel under the plaintiff's directions; but no conveyance was made of the land to the plaintiff. The guinea was afterwards tendered to the defendant, but he refused to receive it or to give his assent to the continuance of the tunnel, and made the obstruction complained of. It was objected on the part of the defendant, that the plaintiff ought to be nonsuited, this being a right claimed in or over the land, which could not pass by parol license without deed; and the declaration states that the plaintiff had a right to the goit *by reason of his possession of the mill*, whereas it appeared that he had it by virtue of the agreement. But the learned judge refused to nonsuit the plaintiff, on the ground that as the agreement was made in respect of the mill, and as it might be disputable whether if the mill were taken away the plaintiff could have a right to the water for other purposes, the declaration stated the right with sufficient correctness, and his claim might be supported without deed, but reserved the point. The defendant then called witnesses, and there was a verdict for the plaintiff with nominal damages.

Park and *Topping* showed cause shortly against a rule for setting aside the verdict and entering a nonsuit, on the ground that it was sufficient for the plaintiff against a wrong-doer to declare upon his *possession* of the mill with the appurtenances. But

LORD ELLENBOROUGH, C. J., said, that such an allegation could not be sustained without showing that the *appurtenances* were *legally* such. Now here the title to have the water flowing in the tunnel over the defendant's land could not pass by parol license without deed; and the plaintiff could not be entitled to it, as stated in the declaration, by reason of his *possession of the mill*, but he had it by the license of the defendant, or by contract with him; and if by license, it was revocable at any time. The enjoyment with the defendant's assent was not left as evidence to the jury to presume a grant, but it was supposed that it gave a title in point of law, which it clearly did not.

PER CURIAM.

*Rule absolute.*¹

Cockell, Serjt., *Holroyd* and *Hardy* were to have supported the rule.

¹ "A right of way or a right of passage for water (where it does not create an interest in the land), is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot), otherwise than by deed." *Per* BAYLEY, J., in *Hewlins v. Shippam*, 5 B. & C. 221, 229 (1826).

J

WINTER v. BROCKWELL.

KING'S BENCH. 1807.

[Reported 8 East, 308.]

THIS was an action on the case for a nuisance, wherein the plaintiff complained, that being lawfully possessed of a dwelling-house with the appurtenances in Long Acre, &c. (Westminster), into which the light and air entered by means of a window from a certain open area between the said window and an adjoining house; by means of which open area also noisome smells which came from the adjoining house evaporated, without occasioning any nuisance to the occupier of the plaintiff's house; the defendant wrongfully placed a skylight over the area above the plaintiff's window, by means of which the light and air were prevented from entering the plaintiff's window into his house, and noisome smells arising from the adjoining house were prevented from evaporating, and entered the plaintiff's dwelling-house, &c. Plea, the general issue. At the trial before *Lord Ellenborough*, C. J., at the last sittings at Westminster, the defence set up was that the area which belonged to the defendant's house had been enclosed and covered by a skylight in the manner stated, with the express consent and approbation of the plaintiff, obtained before the enclosure was made, who also gave leave to have part of the framework nailed against his wall. But some time after it was finished the plaintiff objected to it, and gave notice to have it removed. But his lordship was of opinion, that the license given by the plaintiff to erect the skylight, having been acted upon by the defendant, and the expense incurred, could not be recalled, and the defendant made a wrongdoer, — at least not without putting him in the same situation as before, by offering to pay all the expenses which had been incurred in consequence of it; and under this direction the defendant obtained a verdict.

Wigley (in the absence of the Attorney-General) now moved for a new trial; but after stating the point,¹

LORD ELLENBOROUGH, C. J., said that the Attorney-General, who led the cause at the trial, had himself mentioned this case at the beginning of the term, in the argument of the case of the Quarriers in the Isle of Purbeck, certainly without intimating any disapprobation of the opinion which had been delivered at the trial, but insisting upon it in support of his argument. His Lordship added that the point was new to him when it occurred at the trial; but he then thought it very unreasonable, that after a party had been led to incur expense in consequence

¹ A doubt was also suggested, which was stated and overruled at the trial, whether a parcel license, as this was, was good by the Statute of Frauds, as relating to an interest in land. See *Wood v. Lake*, *Sayer's Rep.* 3, and *Crosby v. Wadsworth*, 6 East, 602. — *REP.*

of having obtained a license from another to do an act, and that the license had been acted upon, that other should be permitted to recall his license and treat the first as a trespasser for having done that very act. That he had afterwards looked into the books upon this point, and found himself justified by the case of *Web v. Paternoster* (best reported in Palmer, 71, but reported also in other books, Poph. 151; 2 Roll. Rep. 143, 152), where Haughton, J., lays down the rule, that a license executed is not countermandable, but only when it is executory. And here the license was executed.

Wigley thereupon waived his motion.¹

✓ LIGGINS v. INGE.

COMMON PLEAS. 1831.

[Reported 7 Bing. 682.]

TINDAL, C. J.² It will be unnecessary on the present occasion to consider more than one of the questions which have been argued at the bar; namely, whether the present action, upon the facts stated in the award of the arbitrator, is maintainable against the defendants.

The action is, in point of form, an action of tort, and charges the defendants with wrongfully continuing a certain weir or fletcher, which the defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water, and preventing it from flowing to the plaintiff's mill in the manner it had been formerly accustomed to do.

It appeared in evidence before the arbitrator that the bank of the river, which had been cut down, was the soil of the defendants; and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the defendants, and at their expense, in the year 1822, under a parol license to them given for that purpose by the plaintiff's father, the then owner of his mill; and that in the year 1827 the plaintiff's father represented to the defendants

¹ "All that the defendant there [in *Winter v. Brockwell*] did, he did upon his own land. He claimed no right or easement upon the plaintiff's. The plaintiff claimed a right and easement against him; viz., the privilege of light and air through a parlor window, and a free passage for the smells of an adjoining house through defendant's area: and the only point decided there was, that as the plaintiff had consented to the obstruction of such his easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it." *Per* BAYLEY, J., in *Hewlins v. Shippam*, 5 B. & C. 221, 233 (1826). *Cf.* Gale, Eas. (7th ed.) 26.

² The opinion only is given.

that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill, and had called upon them to restore the bank to its former state and condition; with which requisition the defendants had refused to comply.

The question, therefore, is, whether such non-compliance, and the keeping the weir in the same state after, and notwithstanding the countermand of the license, is such a wrong done on the part of the defendants as to make them liable to this action.

The argument on the part of the plaintiff has been, that such parol license is, in its nature, countermandable at any time at the pleasure of the party who gave it. That to hold otherwise would be to allow to a parol license the effect of passing to the defendants a permanent interest in part of the water which before ran to the plaintiff's mill; which interest, at common law, could only pass by grant under seal, being an incorporeal hereditament, and which, at all events, would be determinable at the will of the grantor since the Statute of Frauds, as being "an interest in, to, or out of lands, tenements, and hereditaments."

If it was necessary to hold that a right or interest in any part of the water, which before flowed to the plaintiff's mill, must be shown to have passed from the plaintiff's father to the defendants under the license, in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow. For it cannot be denied that the right to the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant, as an incorporeal hereditament, and not by parol license.

But we think the operation and effect of the license, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burden of restoring to its former state what has been done under the license, although such license is countermanded; and, consequently, that they are not liable to an action as wrongdoers for persisting in such refusal.

The parol license, as it is stated in the award of the arbitrator, was a license to cut down and to lower the bank and to erect the weir. Strictly speaking, if the license was to be confined to those terms, it was at once unnecessary and inoperative; for the soil being the property of the defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be the necessary consequence of such acts, it must be taken that the object and effect of such license was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations.

We do not, however, consider the object, and still less the effect, of the parol license, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such

water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burden of restoring matters to their former state and condition.

Water flowing in a stream, it is well settled, by the law of England, is *publici juris*. By the Roman law running water, light, and air, were considered as some of those things which had the name of *res communes*, and which were defined "things, the property of which belong to no person, but the use to all." And, by the law of England, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates, against any other. *Bealey v. Shaw and Others*, 6 East, 207. And it seems consistent with the same principle that the water, after it has been so made subservient to private uses by appropriation, should again become *publici juris* by the mere act of relinquishment. There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person who formerly had a mill upon a stream should pull it down, and remove the works, with the intention never to return. Could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished? Or that he could be compellable to pull down his mill if the former mill-owner should afterwards change his determination and wish to rebuild his own?

In such a case it would undoubtedly be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill; for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream, — that is, if he had licensed the other party to erect a mill, — the same inference must follow with greater certainty. Or suppose A. authorizes B., by express license, to build a house on B.'s own land, close adjoining to some of the windows of A.'s house, so as to intercept part of the light: could he afterwards compel B. to pull the house down again, simply by giving notice that he countermanded the license? Still further, this is not a license to do acts which consist in repetition, as to walk in a park, to use a carriage way, to fish in the waters of another, or the like, — which license, if countermanded, the party is but in the same situation as he was before it was granted; but this is

a license to construct a work which is attended with expense to the party using the license; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a license to do something that, in its own nature, seems intended to be permanent and continuing. And it was the fault of the party himself, if he meant to reserve the power of revoking such a license, after it was carried into effect, that he did not expressly reserve that right when he granted the license, or limit it as to duration. Indeed the person who authorizes the weir to be erected becomes, in some sense, a party to the actual erection of it, and cannot afterwards complain of the result of an act which he himself contributed to effect.

Upon principle, therefore, we think the license in the present case, after it was executed, was not countermandable by the person who gave it, and consequently that the present action cannot be maintained. And, upon authority, this case appears to be already decided by that of *Winter v. Brockwell* [8 East, 308], which rests on the judgment in *Web v. Paternoster* [Palm. 71]. We see no reason to doubt the authority of that case, confirmed, as it since has been, by the case of *Taylor v. Waters* [7 Taunt. 374] in this court, and recognized as law in the judgment of Mr. Justice Bayley, in the case of *Hewlins v. Shipham* [5 B. & C. 221], in the Court of B. R.

We therefore think the rule for setting aside the award of the arbitrator must be made absolute.

*Rule absolute.*¹

Merewether, Serjt., for the plaintiff.

Goulburn, Serjt., *contra*.

¹ See *Addison v. Flack*, 2 Gill, 221. But see *Veghte v. Raritan Water Power Co.*, 4 C. E. Green, 142, 154.

"The right of a riparian owner to have the water of the stream flow in its natural stream in some respects resembles an easement, but it is not an easement properly so-called, nor is it treated as an easement in law; it is an ordinary incident of riparian property, and differs from an easement in being appurtenant by nature without a special title of grant or prescription. . . . Also a right acquired by a riparian owner to divert the water of a natural stream through his own land, though sometimes spoken of as an easement, is not properly so called. It is an act of ownership; and so far as it may be an appropriation of the water, it takes that which was not before the subject of property; it may permanently diminish the stream to the lower tenements, but it does not otherwise render them servient to any use or interference of the upper owner." *Leake, Land Law*, Pt. iii. p. 226.

✓
WOOD v. MANLEY.

QUEEN'S BENCH. 1839.

[Reported 11 A. & E. 34.]

TRESPASS for breaking and entering plaintiff's close. Plea (besides others not material here), as to entering the close, that defendant, before the time when, &c., was lawfully possessed of a large quantity of hay, which was upon plaintiff's close in which, &c., and that defendant, at the times when, &c., by leave and license of the plaintiff to him for that purpose first given and granted, peaceably entered the close, to carry off the said hay; and did then and there peaceably take his said hay from and out of the said close, as he lawfully, &c., which are the said alleged trespasses, &c. Replication, *de injuria*.

On the trial before *Erskine, J.*, at the last Somersetshire Assizes, it appeared that the plaintiff was tenant of a farm, including the *locus in quo*; and that, his landlord having distrained on him for rent, the goods seized, comprehending the hay mentioned in the plea, were sold on the premises; the conditions of the sale being that the purchasers might let the hay remain on the premises till the Lady-day following (1838), and enter on the premises in the meanwhile, as often as they pleased, to remove it. The defendant purchased the hay at the sale, and evidence was given to show that the plaintiff was a party to these conditions. After the sale, on 26th January, 1838, plaintiff served upon defendant a written notice not to enter or commit any trespass on his, the plaintiff's premises. In February following defendant served plaintiff with a written demand to deliver up the hay, or to suffer him, defendant, to have access thereto and carry it away; threatening an action in default thereof. The plaintiff, however, locked up the gate leading to the *locus in quo*, where the hay was; and the defendant, on 1st March, 1838, broke the gate open, entered the close, and carried away the hay. The learned judge told the jury that, if the plaintiff assented to the conditions of sale at the time of the sale, this amounted to a license to enter and take the goods, which license was not revocable: and he therefore directed them to find on this issue for the defendant, if they thought the plaintiff had so assented. Verdict for the defendant.

Crowder now moved for a new trial, on the ground of misdirection.

LORD DENMAN, C. J. Mr. Crowder's argument goes this length,—that if I sell goods to a party who is, by the terms of the sale, to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this: a license thus given and acted upon is irrevocable.

PATTESON, J. *Taylor v. Waters*, 7 Taunt. 374, shows that a license to use a seat at the opera-house, paid for and acted upon by sitting

there, cannot be countermanded. Here the conditions of sale, to which the plaintiff is a party, are that any one who buys shall be at liberty to enter and take. A person does buy: part of his understanding is that he is to be allowed to enter and take. The license is therefore so far executed as to be irrevocable equally with that in *Taylor v. Waters*. The case put by Mr. Crowder is different. I do not say that a mere purchase will give a license; but here the license is part of the very contract.

WILLIAMS, J. The plaintiff, having assented to the terms of the contract, put himself into a situation from which he could not withdraw.

COLERIDGE, J. The pleadings raise the issue whether, when the act complained of was done, the leave and license existed: it did exist if it was irrevocable; and I think it was irrevocable. Although no one of the cases referred to is exactly the same as this, yet all proceed on the principle that a man, who, by consenting to certain terms, induces another to do an act, shall not afterwards withdraw from those terms.

*Rule refused.*¹

WILLIAMS v. MORRIS.

EXCHEQUER. 1841.

[Reported 8 M. & W. 488.]

TRESPASS for breaking and entering the plaintiff's house, barn, stable, and two closes called the rickyard and the foldyard, breaking to pieces locks and doors, &c., and seizing and carrying away the plaintiff's cattle and goods. There were two counts in the declaration, the first for a trespass on the 1st November, 1839, the second for a similar trespass on the 5th February, 1840.

Pleas, first, not guilty; secondly, a general plea of leave and license; thirdly, to the first count, that the dwelling-house, barn, stable, closes, doors, &c., cattle, goods, and chattels in that count mentioned were not, nor was any of them, nor was any part thereof, the dwelling-house, &c. &c. of the plaintiff, *modo et forma*; fourthly, a similar plea to the second count. The plaintiff joined issue on the first, third, and fourth pleas, and to the second replied *de injuria*, on which also issue was joined.

At the trial before *Williams, J.*, at the last Denbighshire Assizes, the following facts appeared:—

The plaintiff, who occupied a small farm in the parish of Abergelle, in Denbighshire, being indebted to one Roberts in a sum of about 80*l.*,

¹ See *Hatfield v. Baum*, 13 Ired. 394. That a reasonable time must be given for the removal of goods placed by license on the licensor's land, see *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400.

was sued by him to judgment, and in November, 1839, a *fiery facias* issued against him, under which the cattle, corn, hay, &c., and other goods on his premises, were taken in execution. The sheriff being about to proceed to a sale, the plaintiff applied to the defendants Morris and Davies, who were farmers in the neighborhood, to befriend him by buying in goods at the sale, and giving him a short time for the repayment of the money advanced for that purpose. The defendants accordingly attended at the sale, on the 6th and 7th of December, 1839, and bought in their own names, Morris to the amount of 72*l.* 9*s.* 11*d.*, and Davies to the amount of 9*l.* 9*s.* 5*d.*, making together 81*l.* 19*s.* 4*d.*; the whole proceeds of the sale being 100*l.* 1*s.* 4*d.* One of the conditions of the sale was, that the property purchased was to be paid for immediately, and taken off the premises, but if left there, to be at the risk of the purchaser. Evidence was given of statements made by both these defendants at the time of the sale, that they were buying for the plaintiff, in consequence of which several persons refrained from bidding for some of the articles put up to sale. All the cattle and goods so bought by the defendants remained on the premises, and in the possession of the plaintiff, but the defendants disposed of several quantities of corn and beans, and a few other articles, to different purchasers, who paid the defendants for them. About a week after the sale, the defendants Morris and Davies came to the plaintiff's house, telling him they wanted some understanding about the property bought in at the sale; that they wanted no profit, but he ought to pay them interest on the amount they had purchased for him. The plaintiff promised that they should have the money in two months from the time of the sale, with which they expressed themselves satisfied. A short time afterwards, an account was drawn out as between the defendant Morris and the plaintiff, on the debit side of which were placed the sums paid by Morris and Davies at the sale, together with an item of 1*l.* for interest to the 7th February, 1840, and on the credit side different sums received by them for the corn, beans, &c., sold subsequently to the sale, and showing a balance of upwards of 25*l.* due from the plaintiff to the defendants. At the same time, the articles bought by the defendants which still remained on the premises, were marked with their names in the plaintiff's presence. On the 23d January, 1840, the same two defendants came again to the plaintiff's house, when the account was read over, and the defendants required that the plaintiff should find sureties for the repayment of the money, and on his stating that he was unable to do so, said they should take the goods away; and after considerable discussion and negotiation, they accordingly, assisted by the other defendants, broke open several of the farm gates, and the barn door, and took away the horses from the stable, together with several carts and harrows, some hay, vetches, &c. On the 5th February, they came again to the premises, broke open the door of the house, which the plaintiff had bolted against them, and took away all the rest of the cattle and goods left from the sale.

Some evidence was given to show that certain articles of small value were also carried away by the defendants, which had not been put up at the sale. For the defendants, it was contended that the goods were *bona fide* purchased by them, subject only to an agreement that the plaintiff might repurchase them within a reasonable time, and that under the circumstances the defendants were entitled to enter and retake them. The learned judge, in summing up, left it to the jury to say, first, whether the goods were bought by the defendants out and out, so that the property in them passed out of the plaintiff; and secondly, whether any articles were taken away by the defendants which were not included in the sale: and with respect to the plea of leave and license, he expressed his opinion that it was entirely unsupported by the evidence. The jury found a verdict for the plaintiff, damages 40s.

In Easter Term, *Townsend* obtained a rule *nisi* for a new trial, on the ground that the learned judge had misdirected the jury as to the issue on the plea of leave and license; citing *Wood v. Manley*, 11 Ad. & Ell. 34; 3 P. & D. 5: against which

Jervis and Welsby now showed cause.

Kelly and Townsend in support of the rule.

PARKE, B. I think no ground has been laid for a new trial. I am not satisfied that this point was distinctly made at the trial; but at all events, there was no evidence of a bargain by the plaintiff, for good consideration, to allow the defendants to enter upon his premises and take the goods, if they were not paid for within a given time. In *Wood v. Manley* there was proof of an express agreement that the purchasers of the goods might enter upon the premises when they pleased, in order to remove them. Here the plaintiff's case was, that the goods were not bought by the defendants at all, but that they were acting merely as his agents. With respect to the cases which have been referred to, [*Web v. Paternoster*, Palmer, 71; *Tayler v. Waters*, 7 Taunt. 384,] much doubt, as I have already observed, has been thrown upon their authority in a recent work of great ability and learning; and it certainly strikes one as a strong proposition to say that such a license can be irrevocable, unless it amount to an interest in land, which must therefore be conveyed by deed. It is not necessary, however, to decide that point in the present case: it is sufficient to say that there is no proof of any agreement by which the defendants were authorized to enter upon the plaintiff's premises and take the goods. The rule must therefore be discharged.

The other Barons concurred.

*Rule discharged.*¹

¹ See *Parker v. Barlow*, 98 Ga. 700.

J
WOOD v. LEADBITTER.

EXCHEQUER. 1845.

[Reported 13 M. & W. 838.]

ALDERSON, B.¹ This was an action tried before my Brother Rolfe at the sittings after last Trinity Term. It was an action for an assault and false imprisonment. The plea (on which alone any question arose) was that at the time of the alleged trespass the plaintiff was in a certain close of Lord Eglintoun, and the defendant, as the servant of Lord Eglintoun, and by his command, laid his hands upon the plaintiff in order to remove him from the said close, using no unnecessary violence. Replication, that, at the time of such removal, the plaintiff was in the said close by *the leave and license of Lord Eglintoun*. The leave and license was traversed by the defendant, and issue was joined on that traverse. On the trial it appeared that the place from which the plaintiff was removed by the defendant was the enclosure attached to and surrounding the great stand on the Doncaster race-course; that Lord Eglintoun was steward of the races there in the year 1843; that tickets were sold in the town of Doncaster at one guinea each, which were understood to entitle the holders to come into the stand and the enclosure surrounding it, and to remain there every day during the races. These tickets were not signed by Lord Eglintoun, but it must be assumed that they were issued with his privity. It further appeared, that the plaintiff, having purchased one of these tickets, came to the stand during the races of the year 1843, and was there or in the enclosure while the races were going on, and while there, and during the races, the defendant, by the order of Lord Eglintoun, desired him to depart, and gave him notice that if he did not go away, force would be used to turn him out. It must be assumed that the plaintiff had in no respect misconducted himself, and that, if he had not been required to depart, his coming upon and remaining in the enclosure would have been an act justified by his purchase of the ticket. The plaintiff refused to go, and thereupon the defendant, by order of Lord Eglintoun, forced him out, without returning the guinea, using no unnecessary violence.

My Brother Rolfe, in directing the jury, told them that, even assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, still it was lawful for Lord Eglintoun, without returning the guinea, and without assigning any reason for what he did, to order the plaintiff to quit the enclosure, and that if the jury were satisfied that notice was given by Lord Eglintoun to the plaintiff, requiring him to quit the ground, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed, during which he might conveniently have gone away, then the plaintiff was not, at the time of

¹ The opinion only is given.

the removal, on the place in question *by the leave and license of Lord Eglintoun*. On this direction the jury found a verdict for the defendant. In last Michaelmas Term, Mr. *Jervis* obtained a rule *nisi* to set aside the verdict for misdirection, on the ground, that, under the circumstances, Lord Eglintoun must be taken to have given the plaintiff leave to come into and remain in the enclosure during the races; that such leave was not revocable, at all events without returning the guinea; and so that, at the time of the removal, the plaintiff was in the enclosure by the leave and license of Lord Eglintoun. Cause was shown during last term, and the question was argued before my Brothers PARKE and ROLFE and myself; and on account of the conflicting authorities cited in the argument, we took time to consider our judgment, which we are now prepared to deliver.

That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie *in grant*, and not in livery, and to pass by mere delivering of the *deed*. In all the authorities and text-books on the subject, a *deed* is always stated or assumed to be indispensably requisite.

And although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject matter: a right of common, for instance, which is a *profit à prendre*, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple. Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through and to remain in a certain close belonging to Lord Eglintoun; to go and remain where if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land, — it is a right of way and something more; and if we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created otherwise than by deed. The plaintiff, however, in this case argues, that he is not driven to claim the right in question strictly as *grantee*. He contends, that, without any grant from Lord Eglintoun, he had license from him to be in the close in question at the time when he was turned out, and that such license was, under the circumstances, irrevocable. And for this he relies mainly on four cases, which he considers to be expressly in point for him: viz., *Webb v. Paternoster*, reported in five different books, namely, Palmer, 71; Roll. 143 and 152; Noy, 98; Popham, 151, and Godbolt, 282; *Wood v. Lake*, Sayer, 3; *Taylor v. Waters*, 7 Taunt. 374; and *Wood v. Manley*, 11 Ad. & E. 34; 3 Per. & D. 5.

As the argument of the plaintiff rested almost entirely on the au-

thority of these four cases, it is very important to look to them minutely, in order to see the exact points which they severally decided.

Before, however, we proceed to this investigation, it may be convenient to consider the nature of a license, and what are its legal incidents. And for this purpose we cannot do better than refer to Lord C. J. Vaughan's elaborate judgment in the case of *Thomas v. Sorrell*, as it appears in his Reports. The question there was as to the right of the Crown to dispense with certain Statutes regulating the sale of wine, and to license the Vintners' Company to do certain acts notwithstanding those Statutes.

In the course of his judgment the Chief Justice says, Vaughan, 351 : " A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, — are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of *eating*, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequent, and not directly, and as its effect, a dispensation or license may destroy and alter property."

Now, attending to this passage, in conjunction with the title "License" in Brooke's Abridgment, from which, and particularly from paragraph 15, it appears that a license is in its nature revocable, we have before us the whole principle of the law on this subject. A mere license is revocable; but that which is called a license is often something more than a license: it often comprises or is connected with a grant; and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.

It may further be observed, that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a *valid* grant, and it is therefore revocable. Thus, a license by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be as put by Chief Justice Vaughan, a license not only to hunt, but also

to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land; and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a watercourse, to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable.

Having premised these remarks on the general doctrine, we will proceed to consider the four cases relied on by Mr. Jervis for the plaintiff. The first was *Webb v. Paternoster*. That, as appears from the report in Rolle, was an action of trespass, brought against the defendant for eating, by the mouths of his cattle, the plaintiff's hay. The defendant justified under Sir William Plummer, the owner of the fee of the close in which the hay was, averring that Sir W. Plummer leased the close to him, and therefore, as lessee, he turned his cattle into the close, and they ate the hay. The plaintiff replied, that, before the making of the lease, Sir W. Plummer had licensed him to place the hay on the close till he could conveniently sell it, and that, before he could conveniently sell it, Sir W. Plummer leased the land to the defendant. The defendant demurred to the replication.

From the arguments, as given in Rolle, it appears that the plaintiff's counsel, who was first heard, contended, first, that the license, being a license for profit and not merely for pleasure, and being also for a certain time only, namely, till he could sell his hay, was not revocable; and secondly, even if the license was revocable, still that the lease to the defendant was an implied, and not an *express* revocation, and therefore was inoperative against him without notice; and for this he referred to *Mallory's Case*, 5 Rep. 111. To this latter proposition the court appears to have assented; but Dodderidge, J., suggested, that, even if the license was in force, still the licensor did not by such a license preclude himself, nor, consequently, his tenant, from turning cattle on the land, and that the *licensees* ought to have taken care to protect the hay from the cattle. As to this, however, the Chief Justice expressed a doubt. The defendant's counsel was heard some days afterwards, and he alleged that it appeared by the record that the plaintiff had had two years to sell his hay before the defendant's cattle had eaten it; and he argued that the court would say, as matter of law, that this was more than reasonable time; and to this the court assented. The plaintiff's counsel, in reply, reverted to the distinction between the license for profit and a license for pleasure; but Dodderidge denied it, and said that a license to dig gravel, though a license for profit, is revocable; and he said that the true distinction was between a *mere*

license, and a license *coupled with an interest*. Judgment was eventually given for the defendant, on the ground that the plaintiff had had more than reasonable time to sell the hay.

It will be seen, therefore, that the only two points decided were, first, that the question of reasonable time was for the court, and not for the jury; and secondly, that two years was more than a reasonable time. The decision, therefore, itself has no bearing on the point for which it was cited; and the only support which the case affords to the doctrine contended for by the present plaintiff is what is said, in the report of the case in Popham, to have been agreed by the court, namely, that a license for profit for a term certain is not revocable, — a proposition to which, with the qualification we have already pointed out, we entirely accede. It is, moreover, by no means certain that the license in *Webb v. Paternoster* was not a license under seal. The defendant's counsel appears, from the report in Rolle, to speak of the plaintiff as *grantee* of the liberty to stack hay, &c., — a form of expression not very appropriate, if used in respect of a party who had a mere parol license; and the Chief Justice, according to the report in Popham and Palmer, says that the plaintiff had an interest which charged the land, into whose hands soever it should come. And Dodderidge, J., according to the report in Palmer, arguing that the lessee certainly might turn his cattle into his own field, and was not bound to stop their mouths, says it was folly of the plaintiff that he did not *together with the license, take a covenant that it should be lawful for him to fence the hay with a hedge*. From these expressions (and there are others in the various reports of the case having a similar aspect), it certainly seems possible that the license was under seal; and then the only point would be that which alone was in fact decided, namely, whether, supposing the plaintiff to have acquired by grant a right to stack his hay on the land for a limited time, that limited time had expired. Even supposing the license to have been a mere parol license, yet the strong probability is, that Webb had purchased the hay from Sir W. Plummer as a growing crop, with liberty to stack it on the land, and then the parol license might be good as a license coupled with an interest. Be this, however, as it may, the decision, as we have already pointed out, has very little, or rather no bearing on the case before us; and the judgment of Dodderidge, J., as given both in Rolle and Palmer, is in strict accordance with what was afterwards laid down by Vaughan, C. J., and which we consider to be consonant both to principle and authority.

The next decision in order of time is that of *Wood v. Lake*, in Sayer, p. 8. There the defendant had, by a parol agreement, given liberty to the plaintiff to stack coals on the defendant's land for a term of seven years. After the plaintiff had enjoyed this privilege for three years, the defendant locked up the gate of the close. No report is given in Sayer of the arguments at the bar. But from a MS. report of the same case, referred to by Gibbs, C. J., in the case of *Taylor v. Waters*, and which MS. we have had an opportunity of consulting, through the

kindness of the representatives of the late Mr. Justice Burrough,¹ it appears that the argument turned wholly on the point whether the privilege of stacking the coals did or did not amount to a lease; for if it did, then the defendant contended it was void after three years, under the Statute of Frauds, as not being in writing. Lee, C. J., and Denison, J., held it to be no lease, nor uncertain interest in land; but Foster, J., doubted, and desired time to consider. On the last day of term, the court gave judgment for the plaintiff, Foster *non dissentiente*.

Supposing the court to have been right in deciding that this was not a lease (which, however, is doubted by Sir E. Sugden, see 1 V. & P., last edit., p. 139), yet no grounds are stated on which it could be held good as an easement originating merely by parol. Up to this case not a single decision is to be found giving countenance to any such proposition; and we are compelled to say, that, if the court proceeded on the ground that the plaintiff had acquired the easement by the parol license, we do not think it can be supported. But the case may, perhaps, have been decided on another ground. The defendant himself was the party who had agreed to give the easement to the plaintiff; and although the

¹ The following is a copy of the report in the MS. volume of Mr. Justice Burrough:

CASE. — A parol agreement that the plaintiff should have liberty of laying and stacking of coals upon defendant's close, for seven years. Afterwards, defendant forbids plaintiff to lay any more coals there, and shuts up his gates. Defendant says, that plaintiff was but tenant at will. *Quære*, if this was an interest within the description of the Statute of Frauds.

Serjeant Booth. This is but a personal license or easement: 1 Roll. Abr. 850, p. 4; Roll. Rep. 143, 153; 1 Saund. 321. A contract for sale of timber growing upon the land has been determined to be out of the Statute, 1 Ld. Raym. 182. *Vide* the difference of a license and a lease, 1 Lev. 194. This must be taken only as a license, for that the coal-loaders also are to have benefit, as well as plaintiff.

Serjeant Poole, for defendant. Question is, if any interest in land passed by the agreement; for, if interest passed, it is within the Statute, *ergo* void, being for longer term than three years: Bro. License, p. 19; *Thome v. Seabright*, Salk. 24; *Webb v. Paternoster*, Poph. 151. A license to enter upon and occupy land amounts to a lease. The plaintiff not confined to a particular part of the close, and might have covered the whole if he pleased; on that account it is an uncertain interest. The distinction of license to plaintiff and his coal-loader is nothing; he could not stack the coal himself, and it is merely vague. Easement may be of more value than the inheritance; *ex gr. way-leave*.

LEE, C. J. If this be a lease, as it is argued, it is within the Statute, and void, for not being in writing. No answer as yet is given to the case in Popham, when the stacking of hay, which is similar, was determined to be a license. The word *uncertain*, in the Statute, means uncertainty of duration, not of quantity. License was not revocable, and here is no case to show this to be considered as a lease.

DENISON, J. This seems not to be an interest, so called in the language of the law, although easements, in general speaking, may be called interests. Had the plaintiff such an interest as to have maintained a *clausum fregit*? Certainly not. If a man licenses to enjoy lands for five years, there is a lease, because the whole interest passes; but this was only a license for a particular purpose.

FOSTER, J. These interests, grounded upon licenses, are valuable, and deserve the protection of the law, and therefore may perhaps have been within the intention of the words of the Statute. Desired further time for consideration; stood over.

N. B. Afterwards, upon motion for judgment the last day of term, and gave judgment for plaintiff, Foster *non dissentiente*.

action is stated to have been *an action on the case*, it may have been a mere *assumpsit*, — an action on the case on *promises*; and in such an action the plaintiff would certainly be entitled to recover, if the contract was not (and probably the court considered it was not) a contract concerning land, within the 4th section of the Statute of Frauds.

The next case on which the plaintiff relies is *Taylor v. Waters*, reported in 7 Taunt. 374. It was an action by the plaintiff against the door-keeper of the Opera-house, for preventing him from entering the house during the performance of an opera. It appeared that one W. Taylor, being in possession of the Opera-house, as lessee for a long term of years, by a deed, dated the 24th of August, 1792, assigned his interest therein to trustees, on various trusts, for creditors and other claimants, and ultimately in trust for himself. After the execution of this deed, Taylor continued in possession by the permission of the trustees, and he carried on and managed the affairs of the theatre. In March, 1799, he, by deed, granted to one Gourgas, for a valuable consideration, six silver tickets, entitling the holders to admission to the theatre. One of these tickets was sold by Gourgas to the plaintiff, in July, 1799, but no deed of assignment to him was executed. In 1800, Taylor's trustees took possession of the theatre. The plaintiff, however, was allowed to attend the theatre, by virtue of his ticket, until the year 1814, when the defendant Waters, as servant of the trustees, prevented him from entering the theatre; and for this obstruction the action was brought. The cause was tried before C. J. Gibbs, and a verdict found for the plaintiff, and that verdict was afterwards upheld by the Court of Common Pleas. The grounds of the judgment were, that the right under the silver ticket was not an interest in land, but a license irrevocable to permit the plaintiff to enjoy certain privileges thereon; that it was not required by the Statute of Frauds to be in writing, and *consequently*, might be granted without a deed.

The Chief Justice, in support of that doctrine, relied on *Webb v. Paternoster*, which, he said, showed that a beneficial license, to be exercised upon land, might be granted without deed, and could not be countermanded, at least after it had been acted on. The same case, he added, showed that the interest was not such an interest in land as was required by the Statute of Frauds to be in writing; as to which last point all doubt, if there remained any, had (he said) been removed by the case of *Wood v. Lake*.

This judgment is stated by the learned reporter to have comprised the substance of the arguments on both sides, and which, therefore, he does not give in his report. We must infer from this that the attention of the court was not called in the argument to the principles and earlier authorities, to which we have adverted. Brooke, in his Abridgment, Dodderidge, in the case of *Webb v. Paternoster*, and Lord Ellenborough, in the case of *Rex v. Horndon-on-the-Hill*, 4 M. & Selw. 562, all state in the most distinct manner that every license is and must be in its nature revocable, so long as it is a mere license. Where, indeed,

it is connected with a grant, there it may, by ceasing to be a naked license, become irrevocable; but then it is obvious that the grant must exist independently of the license, unless it be a grant capable of being made by parol, or by the instrument giving the license. Now in *Tayler v. Waters* there was no grant of any right at all, unless such right was conferred by the license itself. C. J. Gibbs gives no reason for saying that the license was a license irrevocable, and we cannot but think that he would have paused before he sanctioned a doctrine so entirely repugnant to principle and to the earlier authorities, if they had been fully brought before the court. Again, the Chief Justice is represented as saying that the interest of the plaintiff was not an interest in land within the Statute of Frauds, and that *consequently* it might be granted without deed. How the circumstance, that the interest was not an interest in land within the Statute of Frauds showed it to be grantable without deed, we cannot discover. The precise point decided in *Webb v. Pater-noster* is not adverted to, and it is assumed, without discussion, that the license there must have been a parol license, and a naked license, unconnected with an interest capable of being created by parol. The action was not, as it may have been in *Wood v. Lake*, an action founded on the contract. It was an action on the case for the obstruction, and was founded on the supposition that an actual right to enter and remain in the theatre had vested in the plaintiff, under the license conferred by the silver ticket. With all deference to the high authority from which the judgment in *Tayler v. Waters* proceeded, we feel warranted in saying that it is to the last degree unsatisfactory, — an observation which we have the less hesitation in making, in consequence of its soundness having obviously been doubted by the Court of King's Bench and Mr. Justice Bayley in the case of *Hewlins v. Shippam*.

The fourth and last case relied on by Mr. Jervis was the recent case of *Wood v. Manley*, in the Queen's Bench, 11 Ad. & E. 34; 3 Per. & D. 5. That was an action for trespass *quare clausum fregit*: plea, that defendant was possessed of a large quantity of hay being on the plaintiff's close, and that by leave of plaintiff he entered on the close in question to remove it. Replication, *de injuria*. It was proved at the trial that the hay in question was sold in January, 1838, by the plaintiff's landlord, who had seized it as a distress for rent. The conditions of the sale were, that the purchaser of the hay might leave it on the close until Lady-day, and might in the meantime come on to the close from time to time, as often as he should see fit, to remove it. *These conditions were assented to by the plaintiff*. The defendant became the purchaser, and afterwards, and before Lady-day, the plaintiff locked up the close. The defendant broke open the gate in order to remove the hay. A verdict was found for the defendant, Erskine, J., telling the jury that the license to come from time to time to remove the hay was irrevocable. Mr. Crowder moved to set aside this verdict, on the ground that the license was necessarily revocable, and was in fact revoked. But the Court of Queen's Bench refused to grant a rule, and

we think, quite rightly. This was a case not of a mere license, but of a license coupled with an interest. The hay, by the sale, became the property of the defendant, and the license to remove it became, as in the case of the tree and the deer, put by C. J. Vaughan, irrevocable by the plaintiff; and the rule was properly refused. The case was analogous to that of a man taking my goods, and putting them on his land, in which case I am justified in going on the land and removing them: *Vin. Abr. Trespass, (H) a 2, pl. 12*; and *Patrick v. Colerick, 3 M. & W. 483*.

It appears, therefore, that the only authority necessarily supporting the present plaintiff in the proposition for which he is contending, is the case of *Taylor v. Waters*, in which the real difficulty was not discussed, nor even stated. It was taken for granted, that, if the Statute of Frauds did not apply, a parol license was sufficient, and the necessity of an instrument under seal, by reason of the interest in question being a right in nature of an easement, was by some inadvertence kept entirely out of sight; and for these reasons, even if there had been no conflicting decisions, we should have thought that case to be a very unsafe guide in leading us to a decision, on an occasion where we were called on to lose sight of the ancient landmarks of the common law.

We are not, however, driven to say that we shall disregard that case merely on principle. Giving it the full weight of judicial decision, it is met by several others, which we must entirely disregard, before we can adopt the argument of the plaintiff. In the cases of *Fentiman v. Smith, 4 East, 107*, and *Rex v. Horndon-on-the-Hill, 4 M. & Sel. 565*, which were before *Taylor v. Waters*, Lord Ellenborough and the Court of King's Bench expressly recognized the doctrine, that a license is no grant, and that it is in its nature necessarily revocable, and the further doctrine, that, in order to confer an incorporeal right, an instrument under seal is essential. And in the elaborate judgment of the Court of King's Bench, given by Bayley, J., in *Hewlins v. Shippam, 5 B. & C. 222*, the necessity of a deed, for creating any incorporeal right affecting land, was expressly recognized, and formed the ground of the decision. It is true that the interest in question in that case was a freehold interest, and on that ground Bayley, J., suggests that it might be distinguished from *Taylor v. Waters*; but in an earlier part of that same judgment, he states, conformably to what is the clear law, that, in his opinion, the quantity of interest made no difference; and the distinction is evidently adverted to by him, not because he entertained the opinion that it really was of importance, but only in order to enable him to decide that case without, in terms, saying that he did not consider the case of *Taylor v. Waters* to be law. The doctrine of *Hewlins v. Shippam* has since been recognized and acted upon in *Bryan v. Whistler, 8 B. & C. 288*; *Cocker v. Cowper, 1 C., M. & R. 418*; and *Wallis v. Harrison, 4 M. & W. 588*; and it would be impossible for us to adopt the plaintiff's view of the law without holding all those cases to have been ill-decided. It was suggested that, in the present

case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference: whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil; and it is sufficient, on this point, to say, that in several of the cases we have cited (*Hewlins v. Shippam*, for instance, and *Bryan v. Whistler*) the alleged license had been granted for a valuable consideration, but that was not held to make any difference. We do not advert to the cases of *Winter v. Brockwell*, 8 East, 308, and *Liggins v. Inge*, 7 Bing. 682, or other cases ranging themselves in the same category, as they were decided on grounds inapplicable to the case now before us, and were, in fact, admitted not to bear upon it.

In conclusion, we have only to say, that, acting upon the doctrine relative to licenses, as we find it laid down by Brooke, by Mr. Justice Dodderidge, and by C. J. Vaughan, and sanctioned by *Hewlins v. Shippam*, and the other modern cases proceeding on the same principle, we have come to the conclusion that the direction given to the jury at the trial was correct, and that this rule must be discharged.

*Rule discharged.*¹

Kelly, Wortley, Martin, and Peacock, for the defendant.

Jervis, Humphrey, and Petersdorff, for the plaintiff.

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DEVONSHIRE v. EGLIN.

CHANCERY. 1851.

[Reported 14 Beav. 580.]

THIS bill was filed by the Duke of Devonshire and sixteen other persons against Thomas Eglin.

It stated that in 1840 the town of Grassington was much inconvenienced by the want of a supply of water, and that the plaintiffs discovered that a good supply might be obtained by conveying it through

¹ But see *Drew v. Peer*, 93 Pa. 234. For an action for breach of contract in revoking a license, see *Smart v. Jones*, 33 L. J. C. P. 154, 15 C. B. (N. S.) 717; *Kerrison v. Smith*, [1897] 2 Q. B. 445.

On the rights arising from a contract for lodging, see *White v. Maynard*, 111 Mass. 250, and cases cited. Cf. also *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402; *Johnson v. Wilkinson*, 139 Mass. 3.

On the rights arising from a contract for carriage, see *Dutler v. Manchester, etc. Ry.*, 21 Q. B. D. 207.

the lands of the intermediate proprietors to the town. That the plaintiffs and others raised a subscription for that purpose, and that the plaintiff Mason, on behalf of himself and the other subscribers, applied to the defendant to permit the proposed watercourse to pass under his land, which he agreed to do. "That on behalf of the subscribers," it was agreed that 2s. 6d. a year should be paid the defendant for his permission. That such watercourse was completed in 1840, at an expense of £86, and was used down to 1849; but some disputes as to other matters having arisen, the defendant stopped the watercourse. The bill stated that the 2s. 6d. had never been applied for, but that the plaintiffs were willing to pay it. It alleged that the expenditure had been made on the faith of the agreement, and that no grant by deed had ever been made.

The bill prayed a declaration that the plaintiffs were entitled to the use and enjoyment of the watercourse, and for an injunction to restrain the defendant from obstructing the flow of water through his land.

The defendant admitted he consented to the passage of the water through his land "upon condition of his being paid *a proper and reasonable sum or price* for that consent and permission;" but he said that no sum had at any time been agreed on between him and the plaintiffs as the price of such consent or permission.

That after it had been made the defendant repeatedly applied to the plaintiffs to come to an agreement as to the price to be paid, but no agreement had ever been come to and no price had ever been fixed.

He admitted he had, in December, 1849, diverted the water, and stated that negotiations had taken place, and that he had offered to take 10s. a year for the past, and £1 for the future, but that such offer had not been accepted. He said that he had always been ready to grant the right, upon payment of a just and reasonable sum, but that he had never sold or agreed to sell the watercourse, or to make a grant thereof, and that he never directly or indirectly encouraged the plaintiffs in laying out money in making the watercourse. There being no contract in writing, he insisted on the benefit of the Statute of Frauds, 29 Charles II. cap. 3. He denied the agreement to pay the 2s. 6d. a year, and that fact was not proved.

There was evidence to show that the defendant, without objection, saw the works in their then progress, and said to the workmen: "Take care that you don't stop up my drains in cutting through them, for if you do, I shall tear up your watercourse." There was no other proof that the defendant encouraged the proceedings.

The cause now came on for hearing.

Mr. R. Palmer and *Mr. Currey*, for the plaintiffs.

Mr. Elmsley and *Mr. Prendergast*, for the defendant.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. I think that the frame of this bill is defective; but I will give leave to amend, and express my opinion on the assumption that the record will be put into a proper state.

I am of opinion that the passages read from the answer show that there was a parol agreement to allow the watercourse to be made through the defendant's land, in consideration of payment of a reasonable sum. The watercourse was made in the year 1840, and from that time until the latter end of 1849, this easement was enjoyed without any dispute or contest on the part of the defendant. In that year the defendant, in consequence of other disputes, insisted on the price being ascertained, and the evidence shows that the parties have not since been able to agree. The work has, however, been effected and used nearly ten years, and I am of opinion that the defendant cannot prevent the plaintiff's enjoyment of this right.

The subscribers, who were the contracting parties, are not all plaintiffs; but I will give leave to the plaintiffs to amend the bill by making it on behalf of all the subscribers, and at the same time allowing the defendant to make any objection to the frame of the amended record which he may think fit.

I am of opinion that the inhabitants are entitled to the relief asked, and to the benefit of this water, paying a proper compensation to the defendant; and it appears to me that the regular mode of ascertaining the amount will be to refer it to the master, to ascertain what will be a proper compensation for the past and future use.

The bill being amended by making it on behalf of all the subscribers, the decree was made, declaring the plaintiffs entitled, referring it to the master to ascertain a proper rent, and to settle a proper deed, and granting a perpetual injunction in the terms prayed.¹

J. BERICK v. KERN.

SUPREME COURT OF PENNSYLVANIA. 1826.

[Reported 14 S. & R. 267.]

ON the return of a writ of error from the Common Pleas of Union county, it appeared from the record, that this was a special action on the case, brought by Henry Kern, the defendant in error, against Henry Berick, the plaintiff in error, for diverting a watercourse, in consequence of which he lost the use of his saw-mill. The defendant pleaded, Not guilty.

The material facts, proved on the trial, were that some years before the institution of the suit, Henry Kern, the plaintiff below, being about

¹ See *McManus v. Cooke*, 35 Ch. D. 681.

On the effect of an oral agreement to exchange one way for another over the same close, acted upon, see *Lovell v. Smith*, 3 C. B. (N. S.) 120; *Hamilton v. White*, 5 N. Y. 9.

to erect a saw-mill on a stream which was designated by the witnesses as the right-hand stream, a better seat for the mill was found by his millwright on what was termed the left-hand stream. Kern thereupon applied to Berick for permission to turn the water into the left-hand stream, which was granted. In consequence of this permission, he built the saw-mill upon the left-hand stream. Without the aid of the right-hand stream, the water of the left-hand stream would have been wholly insufficient; but the right-hand stream alone would have served the purposes of the mill three or four months during the year. By a union of the two streams, the mill was rendered about a third more valuable than it would have been with the right-hand stream alone. No deed was executed, nor was any consideration given; but Kern, in consequence of the permission given by Berick, built a very good mill, which did a great deal of business, and which he would not have built on the left-hand stream, if the permission had not been given. When the water was turned away by Berick, the mill was in good order, and it was further proved, that, at the time the trial took place, there was as much or more water in the left-hand stream than there had been before the erection of the saw-mill.

The President of the Court of Common Pleas (*Chapman*) charged the jury as follows:—

“Two questions arise in this cause. The first is, whether Henry Berick, after permitting and agreeing that Henry Kern should turn the water from the right-hand stream to the left-hand stream, when, if he had not given that permission, he would have built his mill upon the right-hand stream, can he, Henry Berick, afterwards withdraw his permission, and thereby destroy the use of Kern's saw-mill. His withdrawing that permission after the mill was built, by removing the stones laid for the purpose of turning the water, if the jury believe these facts, would be a fraud and imposition upon Henry Kern, and he would have no right to remove them. But if he had withdrawn his permission, and removed the dam before Henry Kern was at the expense of building a mill, he would have been justifiable in so doing. Or if the permission was by parol to enjoy a right which could only pass by grant for a consideration, it would be within the Statute of Frauds and Perjuries, and not good in law. But if the jury believe the act was fraudulent in Henry Berick, he is liable to pay damages to Henry Kern for the injury done him. Of the amount of damages the jury are the judges. The second question, — if the jury believe that no fraud has been committed by Henry Berick, is, did Berick, by removing the dam, divert the water from the left-hand stream, so as to leave less water running in the left-hand stream than there was formerly before the dam was erected? This is a fact for the jury; and if the jury believe that Berick has diverted the water from the ancient channel, which he had no right to do to the injury of Kern, and that Kern has suffered damage thereby, the jury are to determine to what amount if any damage the plaintiff has suffered.”

The court was requested, by the counsel for the defendant, to instruct the jury in the following manner: —

“1. That if Rerick, about the year 1811, did allow the plaintiff, as proved by William Teats, to place an obstruction in the natural channel of one branch of the stream on Rerick's own land, yet that being without any consideration, and merely by parol, no legal right to the stream, or the use thereof, passed thereby to Kern, but Rerick had a right, at any time, to remove the said obstruction, so that the water could flow at any time in its natural channel.”

Answer. “In answer to the first question, — he would have a right to remove the said obstruction, before Kern had incurred the expense of building a saw-mill on the faith of Rerick's promise, or he would have had a right, if the permission or promise had been after the building of the mill, but not after he had induced Kern to be at the expense of building the mill.”

“2. That an action for diverting an ancient watercourse does not lie for removing an artificial obstruction from the natural channel, whereby the water was made to flow as it used to do from time immemorial.”

Answer. “That is the general principle of the law; but to this there are exceptions, where, by so doing, the party commits a fraud and an action will lie.”

“3. That if the jury believe the whole evidence exhibited by the plaintiff in this cause, Rerick could legally, in the fall of 1821, remove the dam placed in the forks of the stream by Kern on Rerick's land, and for removing the same no action lies, whether Kern sustained thereby a loss or not.”

Answer. “If the jury believe that there was no fraud in Rerick's removing the dam, in which case he would have a legal right to do it, no action would lie.”

“4. That if the jury believe the water, ever since the removal of the obstruction at the forks, has run, and continues to run, in its natural channel, as it used to do from time immemorial, their verdict should be for the defendant.”

Answer. “If the jury so believe, and that no fraud was committed by removing this obstruction, or dam, then your verdict should be for the defendant.”

The counsel for the defendant excepted to the opinion of the court, both in their charge to the jury and in their answers to the several propositions submitted to them.

Greenough, for the plaintiff in error.

Lashells, for the defendant in error.

The opinion of the court was delivered by

GIBSON, J. To the objection, that an action for diverting an ancient watercourse is not supported by evidence of the removal of an artificial obstruction, it is sufficient to answer, that in the case before us, the right depends, not on the antiquity of the watercourse, but on the

agreement of the parties; and the question therefore is, Would equity carry this agreement into effect?

That such an agreement may be proved by parol, was settled in *Le Fevre v. Le Fevre*, 4 Serg. & Rawle, 241, which, in this respect, goes as far as the case before us. The defence there was, that the right, being incorporeal, and therefore lying in grant, could pass only by deed. But as the agreement was for a privilege to lay pipes, it is evident that the right acquired under it was no further incorporeal than that which passes by the grant of a mine, or of a right to build, which indisputably vests an interest in the soil. A right of way, which has been thought to approach it more nearly, in fact differs from it still further. But the defence in this case is put on other ground, it being contended that a mere license is revocable under all circumstances, and at any time.

But a license may become an agreement on valuable consideration, as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed in specie? That a party should be let off from his contract on payment of a compensation in damages, is consistent with no system of morals but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence the judgment of a court of law operates on the right of a party, and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy. How very inadequate it would be in a case like this, is perceived by considering that a license which has been followed by the expenditure of ten thousand dollars, as a necessary qualification to the enjoyment of it, may be revoked by an obstinate man who is not worth as many cents. But, besides this risk of insolvency, the law in barely compensating the want of performance, subjects the injured party to risk from the ignorance or dishonesty of those who are to estimate the *quantum* of the compensation. In the case under consideration, no objection to a specific performance can be founded on the intrinsic nature of the agreement, nor, having been partly executed, on the circumstance of its resting in parol; but it is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent.

A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission

to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case the parties might perhaps be thought to be remitted to their former rights. But having had in view an unlimited enjoyment of the privilege, the grantee has purchased by the expenditure of money a right, indefinite in point of duration, which cannot be forfeited by non-user, unless for a period sufficient to raise the presumption of a release. The right to rebuild, in case of destruction or dilapidation, and to continue the business on its original footing, may have been in view as necessary to his safety, and may have been an inducement to the particular investment in the first instance. The cost of rebuilding a furnace, for instance, would be trivial when weighed with the loss that would be caused by breaking up the business and turning the capital into other channels; and therefore a license to use water for a furnace would endure forever. But it is otherwise where the object to be accomplished is temporary. Such usually is the object to be accomplished by a saw-mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business necessarily is at an end. But, till then, it constitutes a right for the violation of which redress may be had by action. With this qualification it may safely be affirmed that expending money or labor, in consequence of a license to divert a watercourse or use a water-power in a particular way, has the effect of turning such license into an agreement that will be executed in equity. Here it was not pretended that the license had expired, and we are unable to discover an error in the opinion of the court on the points that were propounded.

*Judgment affirmed.*¹

¹ The doctrine of *Rerick v. Kern* has been adhered to in Pennsylvania. It has been adopted in Alabama, *Rhodes v. Otis*, 33 Ala. 578; Ohio, *Wilson v. Chalfant*, 15 Ohio, 248 (but see *Wilkins v. Irvine*, 33 Ohio St. 138); Indiana, *Buchanan v. Logansport R. Co.*, 71 Ind. 265; Iowa, *Decorah Woollen Co. v. Greer*, 49 Iowa, 490; and Nevada, *Lee v. McLeod*, 12 Nev. 280. The favor once shown to it in Maine, *Ricker v. Kelly*, 1 Greenl. 117; in New Hampshire, *Americusoggin Bridge v. Bragg*, 11 N. H. 102; and in Illinois, *Russell v. Hubbard*, 59 Ill. 335,—seems to be now almost, if not quite, wholly withdrawn. *Pitman v. Poor*, 38 Me. 237; *Houston v. Laffee*, 46 N. H. 505; *Batchelder v. Hibbard*, 58 N. H. 269; *Kamphouse v. Gaffner*, 78 Ill. 458; *Forbes v. Balenseifer*, 74 Ill. 188; *Tanner v. Volentine*, 75 Ill. 624; *Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384, 391.

Even where *Rerick v. Kern* is law, a license is revocable before it is acted upon. *Huff v. McCauley*, 53 Pa. 206; *Williamson v. Yingling*, 93 Ind. 42.

J
BRIDGES v. PURCELL.

SUPREME COURT OF NORTH CAROLINA. 1886.

[Reported 1 Dev. & B. 492.]

THIS was a petition filed by the plaintiff for an injury to his land and dwelling, caused by a mill-pond of the defendants.

Upon the trial before *Strange*, Judge, at Roberson, on the last Fall Circuit, the only question being whether the plaintiff had a right to recover, and if so, how much, the defendants proved that the father of the plaintiff, under whom he claimed, being informed, previously to the erection of the dam, by the person under whom they claimed, of his intention to build a mill, expressed his satisfaction at the prospect, and gave his permission to raise the dam as high as might be necessary.

His Honor informed the jury that if they believed this testimony, the plaintiff could not recover, unless the dam had, subsequently to the license, been raised still higher.

A verdict was returned for the plaintiff; but he, being dissatisfied with the amount of damages, appealed.

No counsel appeared for either party.

GASTON, Judge. The error assigned upon this appeal is to be found in an exception to the charge of the judge. The instruction complained of lays it down for law, that if the owner of a tract of land has, by the erection of a mill-dam, ponded the land of another, under a parol license from him, those who succeed to the estate in the land thus ponded, cannot, because of a continuance of the nuisance, recover against the alienee of him who erected the dam, unless the dam has been raised to a greater height than was originally permitted. We suppose that this instruction is founded upon a principle recognized, or thought to be recognized, in several adjudications, that a verbal authority is not only an excuse for what has been done under it, but cannot be countermanded if once acted upon, without, at least, putting the person licensed in the same condition wherein he was before acting on the license. The occasion does not call upon us to examine the correctness of this principle, or to define its extent, should the correctness be admitted; and on questions of acknowledged difficulty, where we have not the benefit of a discussion (and in this case there has been no counsel), we feel ourselves bound to exercise caution in forbearing to decide any unnecessary point. The cases that bear upon this doctrine, so far as we know of them, and they are accessible to us, have been carefully examined, and the result is, a conviction that they do not warrant the instruction given; or, if they do, that the instruction, notwithstanding these decisions, is, nevertheless, erroneous. One of the latest of these decisions is *Liggins v. Inge*, reported 7 Bing. 682. It is not amiss to remark the extreme caution with which that

case is spoken of by Chief Justice Denman, in delivering his very able opinion, and the judgment of the court on the case of *Mason v. Hill*, reported 5 Barn. & Ald. 1. Supposing it, however, to have been properly decided (of which we say nothing), it seems to us to have been determined on grounds not applicable to the subject now under consideration. In that case the plaintiff's father, by parol license, had permitted the defendants to lower the banks of a river, and make a weir above the plaintiff's mill, whereby less water flowed to it than before; and it was held that the plaintiff could not sue the defendants for refusing to raise the bank to its former height, and to remove the weir, and thus continuing the *diminished* flow of water to the plaintiff's mill. The determination is distinctly placed upon these positions, that the water in the river is public property, open to the use of all; that the party who first appropriates to his own use any portion of it flowing through his own land, has the right to the use of what is thus appropriated, against all others; and that the water, after such appropriation, may be given back to the public, and then appropriated by other individuals to their use. The parol license was regarded, not as transferring to the defendants any right or interest in the water accustomed to flow to the plaintiff's mill, but as giving back and yielding up to *the public* — for the use of whoever might afterwards appropriate it — *that quantity* of the water which found its way over the weir and the lowered banks. In the present case the defendants claim the privilege to throw the water of their mill-pond *upon the land of the plaintiff*. They certainly have it not of common right. They claim it as having belonged to their vendor, because of a license from the former proprietor of the plaintiff's land, and as having been transmitted to them, along with his sale of the land, which they hold as an appurtenance to the thing thereby conveyed.

The case of *Taylor v. Waters*, reported 2 Mars. 551, and 7 Taunt. 374, though connected with this subject, decides nothing upon this question. It decides that a license of free admission for the term of twenty-one years to a theatre, on nights of public exhibition, granted for a valuable consideration, is valid. It also decides that such a license may be granted by parol, notwithstanding the Statute of Frauds. Of the first position we see no cause to doubt. A license for a valuable consideration for a specified time, is in law a grant of the thing, or the use thereof for that time, and by the force of the executed contract as a lease, or a grant, passes an irrevocable right during the time to the privilege thereby granted. Popham, 151; Vin. Abr. tit. License, E. Vaughan, 351.

The correctness of the second position has been questioned (see 2 Chitty's Prac. 339, and Sugden on Vendors, 57), and is opposed by a strength of reasoning not easily answered. But we have no concern with it. Our Statute of Frauds certainly does not embrace such a license, whatever interest it may pass, for that Statute applies not to *executed* contracts. The case of *Winter v. Brockwell*, 8 East, 309,

comes from a high authority. The plaintiff brought an action on the case for a nuisance in erecting a skylight over an open area, by means whereof the light and air were kept from his windows, and noisome smells arising from the adjoining house were forced into them. On the general issue the defendant gave in evidence that the erection complained of was made with the plaintiff's express approbation, but that after it was finished, the plaintiff became dissatisfied, and required it to be put down. Lord Ellenborough admitted the point to be new to him, but he thought it *unreasonable* that after a party had been led to incur expense in consequence of having a license from another to do an act, and that license had been acted upon, the other should be permitted to recall his license, and treat the first as a trespasser for having done the act. At the trial he instructed the jury, that the plaintiff could not recall his license without offering to pay all the expenses incurred. When a motion was made by one of the counsel for a new trial, Lord Ellenborough remarked that he found himself justified in the opinion he had given the jury by the case of *Web v. Paternoster*, and thereupon the counsel waived the motion. It is impossible, I think, not to feel with Lord Ellenborough that the plaintiff's conduct was unreasonable, and that he ought not to be permitted to insist on the erection being destroyed without some compensation to the defendant for the expense incurred. The *quantum* of compensation could not be ascertained in that action, and the question would seem to be, whether compensation must be made before the license can be revoked *at law*, or whether a *legal* revocation could not be made, and then the execution of the judgment enjoined until compensation made. The case of *Web v. Paternoster* (said to be best reported in Palmer, 71) was determined upon the point, not that the license was not countermandable, but that it was a license for a convenient time only, and that such time had expired before the act done whereof the plaintiff complained. Two of the judges, Montague and Haughton, expressed an opinion that the license, which was a permission from the owner of the land to put a cock of hay thereon for a reasonable time, passed an interest, which charged the land in the hands of the lessee, notwithstanding a countermand. Dodderidge doubted thereof, but remarked, among other things, that every license which is *in its nature a license*, is countermandable; and Haughton then said that there was a distinction between licenses executed and licenses executory, — that the former were not countermandable, but the latter were. It is not improbable that he regarded the former as irrevocable, because they passed an interest. As the case occurred in the reign of James the 1st, long before the Statute of Frauds, it was argued and decided on common law principles. The case of *Wood v. Lake*, in Sayer, 3, does not apply. There, according to the reporter, it was held that an agreement for one to stack coals on another's land for seven years, may be granted by parol, because it is not an interest. The report is confessedly an inaccurate one, — the decision, if made, is clearly wrong (see Sugden

on Ven., *ut supra*; *Phillips v. Thompson*, 1 John. Ch. Rep. 131); but if the decision were right, it bears not upon the present point.

A license is a power or authority given to a man to do a lawful act. Unquestionably, no countermand can make the act done under it illegal. Here it was not a license to erect a dam, for no license was needed for any such purpose. It was a license, by means of a dam on his own land, to pond water on the land of him who gave the license. It is often difficult to distinguish between a license or a mere authority, and an interest or a license coupled with an interest. It necessarily follows that what is done under either, while in force, is binding upon him who has granted it. Until the license was revoked, the keeping of the water upon the land was lawful. It is a general principle that a mere license may be countermanded; and it is equally a general principle that an interest once passed cannot be recalled. The extent of the grant, whether it be of an authority or an interest, depends not on any technical words, but upon the intention of the parties. Whether a license to do an act which in its consequences permanently affects the property of him who gives it, when so acted on, that what is done cannot conveniently be undone, may be regarded as the grant of an interest to the extent of the consequences thereby authorized, and therefore not revocable; or whether such a license does not necessarily imply a permission for the thing done to remain, notwithstanding the continuing consequences; and therefore the licensor, on a principle of good faith, may be forbidden to withdraw it, without indemnifying him who trusted thereto: whether these or either of these principles can or cannot be extracted from the adjudications, we are of opinion that they do not uphold the instructions complained of. The right to pond water on another's land is an incorporeal hereditament, — a right not indeed to the land itself, but to a privilege on and upon the land, impairing to that extent the dominion of the proprietor therein. Set up as a permanent interest granted to the vendor of the plaintiff, transferable by him, passing with the land to the defendants, it is inoperative, because it is a freehold interest, and cannot pass but by deed. Regarded as a mere license, however irrevocable, between the parties (if, indeed, there can be such without an interest), it is difficult to see how it can be binding between the plaintiff and the defendants. The ancestor of the plaintiff granted a license, and the plaintiff has succeeded to all his estate. Now, if the effect of the license be not to pass any interest out of, or impose any charge upon, the land, the plaintiff has succeeded to an unlimited and unshackled fee simple therein. A mere authority necessarily ceases with the life of the grantor. The plaintiff's ancestor granted a license to the vendor of the defendants; but regarded as a license, how does it inure to the benefit of the defendants? If it passed as an *appurtenance* to the land, it partook of its nature; it was more than an authority, it was an hereditament. To hold that a permission thus given shall operate forever for the benefit of the grantee and his assigns, against the grantor and his heirs, would be, in effect, to

permit a fee simple estate to pass under the name of an irrevocable license. Purchasers would never know what incumbrances were upon their lands, and instead of the solemn and deliberate instruments which the law requires as the indispensable means of transferring freeholds, valuable landed interests would be made to depend wholly on the integrity, capacity, or recollection of witnesses.

The judgment is reversed, with directions to the court below to award a new trial.

PER CURIAM.

*Judgment reversed.*¹

¹ "The most, we think, that can possibly be claimed from the evidence is that the tracks were built under a parol license from plaintiff; and there is nothing better settled than that a mere license, not subsidiary to a valid grant, may be revoked at pleasure, and does not create or transfer any interest in land, even though granted for a valuable consideration, and though the license may be for a purpose which involves the expenditure of money upon the faith of it. The mere fact that the mill company might have, without objection, permitted the railway company to expend large sums of money in building tracks on the land on the faith of the license would not operate as an estoppel. A licensee is conclusively presumed, as a matter of law, to know that a license is revocable at the pleasure of the licensor; and if he expends money in connection with his entry upon the land of the latter he does so at his peril. Any other doctrine would render most licenses irrevocable, and make them operate as conveyances of an interest in land. As to private persons entering as licensees the rule is well settled everywhere. In some jurisdictions a partial exception seems to have been made in favor of railway companies, the courts holding that, if a railway company has entered and built its road under license from the landowner, he will be barred from maintaining ejectment, but will be left to his action of proceedings to recover compensation for the permanent taking of the land. This seems to be placed on the ground that considerations of public policy forbid that the continuous operation of the road should be interrupted. But this distinction in favor of railway companies has been expressly repudiated by this court for reasons stated in *Watson v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 321.

"The principle upon which courts of equity sometimes apply the doctrine of equitable estoppel to cases where the entry has been under a license is that the conduct of the licensor has been such that it would be a fraud on the licensee to permit the licensor to deny that there was a contract for an interest in the land, and hence they treat the case as one of a parol contract partly performed, which the court will enforce. But in this case there was an entire absence, not only of any actual contract between the parties, but also of any fraud, deception, or misrepresentation. If neither party knew that these tracks were being built on plaintiff's land, of course there could have been no deception, nor could either party have been misled by the other. On the other hand, if both parties were aware of the fact, and the plaintiff gave defendant license, either express or implied from acquiescence, to enter its land, there was still no deception or misrepresentation. All that defendant could complain of in such case is that plaintiff has seen fit to revoke a license, which perhaps the defendant thought would never be revoked.

"Again, if any implied agreement as to defendant's occupancy of plaintiff's land could be inferred, the terms are so indefinite and uncertain as to the extent of character of the privilege given, if any, that it would be utterly impossible to determine what it was. How many tracks, or where to be located, no court could possibly determine from any evidence in the case." *MITCHELL, J.*, in *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn. 304, 312 (1892).

And so *Collins v. Marcy*, 25 Conn. 239; *Thoenke v. Fiedler*, 91 Wis. 386. See also *Foot v. New Haven, &c. Co.*, 23 Conn. 214.

Whether even equity will relieve when, on the faith of a license to do an act on the licensor's land, the licensee has gone to great expense but no consideration has

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MORSE v. COPELAND.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1854.

[Reported 2 Gray, 302.]

ACTION of tort for diverting water from the plaintiffs' mill-pond in Easton. The case was submitted to the court upon the following statement of facts:

Josiah and Horatio Copeland, on the 10th of May, 1825, conveyed their interest in a factory and water privilege to the Easton Manufacturing Company, together with the privilege of flowing all the land that either of the grantors then owned, which could be flowed with the height of the dam and saw-mill flume, as it then was, which is also its present height. The Easton Manufacturing Company conveyed the factory and privilege to Shepard Leach, from whom, by mesne conveyances, they have since become the property of the plaintiffs.

Josiah and Horatio Copeland, at the time of making their deed to the Easton Manufacturing Company, each owned land on the northerly side of the factory pond. Josiah Copeland conveyed away his land on that side of the pond in 1836; and his grantee, in 1838, conveyed the same to Caleb Swan, who has since continued to own it. Horatio Copeland conveyed away his land on that side of the pond in 1834; and the defendants acquired his title in 1838, and have since held it. All these conveyances were made expressly subject to the right of flowage granted to the Easton Manufacturing Company by said Copelands.

Leach, while he owned the factory and privilege, in 1831, gave to Josiah and Horatio Copeland an oral permission or license to erect, on their land, a dam or embankment across the mouth of a cove that was formed by the water raised by the factory dam, for the purpose of excluding the water from certain parts of their land; and said Copelands made such a dam or embankment, at their own expense, which remained, and effected the purpose for which it was built, until Septem-

been given to the licensor, *quare*. That it will, see *Southwestern R. R. v. Mitchell*, 69 Ga. 114; *Clark v. Glidden*, 60 Vt. 702. Contra, *Ewing v. Rhea*, 37 Oreg. 583; and see *Hodgkins v. Farrington*, 150 Mass. 19; *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406; *Pitman v. Boyce*, 111 Mo. 387; *Great Falls Water Works Co. v. Great Northern Ry. Co.*, 21 Mont. 487; *Lawrence v. Springer*, 49 N. J. Eq. 289; *Croodale v. Lanigan*, 129 N. Y. 604.

Even if it be found that there was a contract on a good consideration, its terms may have been such as to give rise to only a temporary interest in the land. *Wise-man v. Lucksinger*, 84 N. Y. 81; *Baldwin v. Taylor*, 166 Pa. 507, 518.

The authorities on the questions raised in *Rerick v. Kern* and *Bridges v. Purcell* are collected in a note to 49 *Lawyers' Reports Annotated*, 497.

A licensee may, before revocation of the license, maintain an action of tort against a third party who interferes with the enjoyment of the license. *Miller v. Greenwich*, 62 N. J. L. 771. Cf. *Keystone Lumber Co. v. Kolman*, 94 Wis. 465.

ber, 1853. In the same year (1831) Leach also gave said Copelands an oral permission or license to dig a ditch across his (Leach's) land, now owned by the plaintiffs, for the purpose of draining the water of the factory pond which might accumulate on their land, after the erection of the dam or embankment by them. This ditch was dug by them, and continued till September, 1853.

In June, 1853, the plaintiffs gave written notice to the defendants and to Caleb Swan, requesting a discontinuance of said ditch and a removal of the dam or embankment, and revoking the license under which the same was made. The defendants did not discontinue the ditch nor remove the embankment; and in September, 1853, the plaintiffs stopped the ditch, at a place in their land, and made an incision in the embankment, on the defendants' land; and the water from the factory pond then flowed over the defendants' land and Swan's land, as it did from 1825 to 1831, before the embankment was made. The defendants thereupon dug a ditch on their own land (Swan contributing to the expense thereof), through which all the water, which flowed through the incision made by the plaintiffs in the dam or embankment, was drained off from the defendants' and Swan's land into the stream below the plaintiffs' factory and pond.

For diverting the water through this last ditch from land that the plaintiffs claim as part of their mill-pond, this action is brought. The parties agree that if the plaintiffs had a right to make the said incision in the dam, and are entitled to recover, they shall have judgment for one dollar damages and full costs; if they are not entitled to recover, they are to become nonsuit.

This case was argued at Boston on the 17th of January, 1854.

C. I. Reed, for the plaintiffs.

E. Ames, for the defendants.

METCALF, J. By the deed of Josiah and Horatio Copeland to the Easton Manufacturing Company, dated May 10th, 1825, that company acquired a right to flow all the land of each of the grantors, which could be flowed by the factory dam, as it then existed. The right thus acquired was an easement in the lands of the grantors. That right was transferred, by the company, to Shepard Leach, who thus acquired the same easement. And Leach, in 1831, while he owned the factory and water privilege — which was the dominant tenement — gave an oral license to Joshua and Horatio Copeland, owners of the servient tenement, to erect a dam or embankment on their own land, which should exclude the water from a part of the land which, by their above-mentioned deed, he had a right to flow. That license was executed by them. They made the dam, and it effected the purpose for which it was made, for more than twenty years. In 1853 the plaintiffs, who derive title to the factory and water privilege from Leach, through intermediate conveyances, undertook to revoke the license of 1831; required the defendants to prostrate the dam; and, on the defendants' refusal so to do, prostrated it themselves.

The first question in the case is, whether the plaintiffs can justify that act. We are of opinion that they cannot. For it is a rule of law, that an easement, whether acquired by known grant or by prescription, may be extinguished, renounced or modified, by a parol license granted by the owner of the dominant tenement, and executed by the owner of the servient tenement. The authorities on this point are conclusive. *Dyer v. Sanford*, 9 Met. 395; *Winter v. Brockwell*, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682, and 5 Moore & Payne, 712; *Addison v. Hack*, 2 Gill, 221.

The next question is, whether the license, given by Leach to Josiah and Horatio Copeland, to cut a ditch through his land, and thereby draw off a part of the water of the factory pond, was revocable by the defendants [plaintiffs], and therefore their act in stopping the ditch was justifiable. And it is well settled that it was revocable. An easement in real estate can be acquired only by deed, or by prescription, which supposes a deed. *Cook v. Stearns*, 11 Mass. 533; *Fentiman v. Smith*, 4 East, 107; *Wallis v. Harrison*, 4 M. & W. 538; *Hewlins v. Shippam*, 7 Dowl. & Ryl. 783, and 5 B. & C. 221; *Cocken v. Couper*, 5 Tyrw. 103, and 1 C. M. & R. 418; *Wood v. Leadbitter*, 13 M. & W. 838; *Adams v. Andrews*, 15 Ad. & El. N. R. 284.

The authorities referred to on these first two questions show that the rule, sometimes laid down in the books, that a license executed cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement; but to licenses which, if given by deed, would extinguish or modify an easement. They also show that the distinction, sometimes taken in the books, between a license to do acts on the licensee's own land, and a license to do acts on the licensor's land, is the same distinction that is made between licenses which, if held valid, would create, and licenses which extinguish or modify, an easement. Generally, if not always, a license which, when executed, extinguishes or modifies an easement, is, from the nature of the case, a license to do acts on the servient tenement, — the tenement of the licensee. See *Gale & Whatley on Easements*, Pt. 1, c. 3, § 1.

The last question is, whether the defendants can justify the making of the ditch on their own land, and thereby drawing off the water which flowed through the breach made in the dam erected by them in 1831, on Leach's license. As that water was thrown upon their land by the wrongful act of the plaintiffs, we cannot doubt their right to relieve their land from it by the means which they have adopted.

Plaintiffs nonsuit.

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CHURCHILL v. HULBERT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1872.

[Reported 110 Mass. 42.]

MORTON, J. This is an action of tort for an assault and battery. The evidence tended to show that the defendant forcibly entered the premises of the plaintiff for the purpose of removing certain manure which he claimed as his property; that the plaintiff, being present, forbade his entering, and resisted it by seizing the heads of the defendant's horses to prevent them from proceeding further, and thereupon the defendant struck him with a shovel and broke his arm, and then proceeded to remove the manure. The defendant claimed that he had an irrevocable license to enter and remove the manure, and asked the court to instruct the jury, "that if the defendant had a license from the plaintiff, unrevoked or irrevocable, to enter the plaintiff's premises to remove manure which belonged to the defendant, and the defendant did no more than was necessary to enter and remove the same manure; he is not liable in this action." The court refused this request, and instructed the jury in substance, that though the defendant had an irrevocable license to enter and remove the manure which belonged to him, yet if the plaintiff resisted the defendant's entry, under a claim that the defendant had no manure left on the premises, the defendant had no right to use personal violence to overthrow the plaintiff's resistance and enforce his claim.

We are of opinion that these instructions were at least sufficiently favorable to the defendant. The cases cited by his counsel show that if he had an irrevocable license to enter, he would not be liable in an action of trespass *quare clausum* for an entry, if he could make it without opposition or resistance; but the authorities are clear that if resisted, he had no right to enforce his claim by a breach of the peace. *Sampson v. Henry*, 13 Pick. 379; *Commonwealth v. Haley*, 4 Allen, 318; 3 Bl. Com. 4. If it be assumed, therefore, that the defendant had an irrevocable license to enter the plaintiff's premises, yet upon being resisted it was his duty to desist from his attempt to enter, and resort to his legal remedies. He cannot justify a resort to personal violence to enforce his rights. *Exceptions overruled.*¹

S. W. Bowerman, for the defendant.

M. Wilcox, for the plaintiff.

¹ And see *Willoughby v. R. R. Co.*, 32 S. C. 410. But cf. *Sterling v. Warden*, 51 N. H. 217.

CHAPTER IV.

COVENANTS RUNNING WITH THE LAND.

SECTION I.

AT LAW.

A. *With Leasehold Estates.*

1. INDEPENDENTLY OF STATUTE 32 HENRY VIII. c. 34.

BROOKE, AB., TIT. "COVENANT," PL. 32. (25 H. VIII.)—A man leases a house and land for years, and the lessee covenants that he and his assigns will repair the house, and afterwards the lessee grants over his term, and the assignee does not repair; action of covenant lies against the assignee, for it is a covenant which runs with the land; and so it lies clearly against the lessee after he has assigned over his term; and note that if several writs of covenant are brought against both, there is no remedy until he takes out execution against one, and then note that if he sues the other, he may have an *Audita Querela*; and in the new *Natura Brevium* it is said that the assignee shall have an action of covenant against the lessor because the assignee is named in the deed, and so note that for the same reason the lessor shall have an action of covenant against him; and in H. 48 E. 3, the assignee of the lessee shall have a writ of covenant against the lessor where the assignee was not named in the deed; *quare*, for it is not in the printed report.¹

¹ Statute 32 Henry VIII. c. 34 (*post*, p. 321), applies to leases under seal only; the benefit of an agreement to repair, entered into by the lessee in a parol lease, does not run at common law to an assignee of the reversion. *Standen v. Christmas*, 10 Q. B. 185. But the lessor in such a lease may maintain *assumpsit* against the lessee for a breach occurring after an assignment of the reversion. *Bickford v. Parson*, 5 C. B. 920. See also *Mansel v. Norton*, 22 Ch. D. 769; *Kennedy v. Owen*, 186 Mass. 199.

"An opinion has sometimes been intimated that there were, even at common law, some covenants which ran with the reversion. The authorities, however, seem to preponderate in favor of the doctrine of Serjeant Williams, who, in *Thursby v. Plant*, 1 Wms. Saund. 300, n. 10, says that 'the better opinion seems to be, that the assignees of the reversion could not bring an action of covenant at common law.' And the cases will be best reconciled, and the whole subject far more intelligible, if we adopt the view taken by the learned and eminent personages who have since edited that work (vol. 1, 240 a, note (o)), viz., 'that at common law covenants ran with the land, but not with the reversion. Therefore, the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessor was not:' see *Butler v. Archer*, 12 Ir. C. L. R. 104, 127, *per* Lefroy, C. J." 1 Sm. L. C. (10th ed.) 58.

WALSH v. PACKARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1896.

[Reported 165 Mass. 189.]

HOLMES, J. This is an action upon a covenant appended to a lease, brought by the administratrices of Walsh, the lessor and covenantee. The only objection urged to the plaintiffs' recovery is, that, if the obligation of the covenant did not cease with the life of Walsh, his heirs, and not his administrators, are the proper persons to sue upon it. The covenant is as follows: "In consideration of the letting of the above described premises and one dollar to me paid, the receipt of which is hereby acknowledged, I do hereby become surety for the prompt and full payment of the rent and performance of the covenants as specified in the above lease, to be paid by Ida E. Small to John Walsh. Witness my hand and seal, the twenty-eighth day of November, A. D. 1892. W^m A. Packard (seal)."

The contract raises a question of construction, as well as a question of law when the construction is settled. It does not mention heirs, executors, administrators, or assigns, and courts are a little slower to enlarge by implication the undertaking of a surety or guarantor than they are to enlarge that of the principal party. But perhaps the word "surety," although seemingly inartificially used, coupled with the nature and object of the contract, makes the collateral undertaking as large as the principal one. We will assume that it is to be read in the broader sense. We have no doubt that it continues to run after the death of the original covenantee. But supposing heirs, executors, and assigns to have been mentioned, it seems to be settled in this Commonwealth that the instrument would not work like a letter of credit, offering a new contract to the successors of Walsh (*Saunders v. Saunders*, 154 Mass. 387, 388, and *Abbott v. Hills*, 158 Mass. 396), if that would make any difference when there has been no purchase on the faith of it; and therefore, apart from other reasons, the only ground on which the heirs can be preferred to the administratrices as the proper plaintiffs is that the covenant runs with the land, or, more accurately, runs with the estate of the covenantee, and that the heirs are successors to that estate. The covenant is collateral to the lease (*Virden v. Ellsworth*, 15 Ind. 144), and is not affected by St. 32 Hen. VIII. c. 34. *Harbeck v. Sylvester*, 13 Wend. 608. See *Jones v. Parker*, 163 Mass. 564, 568.

In *Allen v. Culver*, 8 Denio, 284, 301, a similar covenant was held by the Supreme Court of New York to pass to assigns, but the point was decided without discussion on the supposed analogy of *Pakenham's case* (a covenant on the part of a convent that the convent should sing every week in a chapel in the plaintiff's manor), Y. B. 42 Ed. III. 3, pl. 14. The reference to this case showed that the court

did not have in mind the distinction pointed out by Lord Coke, *Chudleigh's case*, 1 Co. Rep. 120 a, 122 b, and discussed in *Norcross v. James*, 140 Mass. 188, between those covenants which create or follow the analogy of easements, and go with the land even to disseisors, and those pure contracts like covenants for title upon which no one can sue except parties and privies. *Pakenham's case* was of the former class. The argument for the plaintiff in that case of most weight in the mind of the court was that the plaintiff was tenant of the land, and that the service claimed was a thing annexed to the land (being of a kind that could be created by prescription), or, as it was stated by Fitzherbert, every one who has the land shall have the covenant. Fitz. Abr. Covenant, pl. 17. Those who are curious to verify the fact assumed in *Pakenham's case*, that such services from a stationary ecclesiastical corporation might be due by prescription may consult Y. B. 22 Hen. VI. 46, pl. 36; 21 Hen. VII. 5, pl. 2; *Williams's case*, 5 Co. Rep. 72 b, 73 a; *Slipper v. Mason*, Nelson's Lutwyche, 43, 45; Rast. Ent. pl. 2 b. See further *Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267. The case at bar, on the other hand, is more analogous to the covenants for title. For although rent savors of the realty, any warranty or insurance of rent is a purely personal contract, of which another than the original contractee can avail himself only on principles of contract. The true question is whether such a guaranty is wholly analogous to covenants for title. In the case of some of these, at least, assigns of the covenantee are treated as privy to the contract, and can sue in their own names, and when this is so, heirs also can sue in their own names for breaches happening while they hold the estate of the covenantee. *Lougher v. Williams*, 2 Lev. 92; Rawle, Covenants (5th ed.), § 316.

But this right thus given to assigns only shortened up the old process by which within certain limits each purchaser looked in turn to his vendor to make good the warranty imported by a sale. It is a doctrine of tradition and history (140 Mass. 189), and cannot be extended to new cases by analogy without legislation. The old cases so far as we know, even the most extreme, are all cases of warranties or covenants by owners of the land. F. N. B. 145, C. Lord St. Leonards says that "there appears to be no direct authority that a stranger to the land can enter into covenants respecting it, which will run with the land in the hands of assignees." V. & P. (14th ed.) 587. And although he seems to have missed the distinction between the two classes of covenants to which we have adverted, this statement we believe to be correct with regard to covenants for title and any others, if others there be, which are governed by the same rules. *King v. Wight*, 155 Mass. 444, 447.

We do not argue from the rule that new and unusual incidents are not to be annexed to land, because that rule seems to belong rather to the law of easements and the like than to the class under discussion. See *Norcross v. James*, 140 Mass. 188, 192.

It is true, no doubt, that the heirs are the only persons interested in the rent, and therefore are the only persons who suffer substantial damages by a failure to pay it. We assume that, if the administratrices recover substantial damages, they will receive them as trustees for the heirs. We agree, as suggested by Lord Ellenborough in a different case, that a recovery by them would bar the heirs from recovering at all. But we do not agree to his further suggestion, that they could recover at most but nominal damages. *Kingdon v. Nottle*, 1 M. & S. 355, 362. At the present day a trustee may recover damages to the extent of the interest of his *cestui que trust*. *Drummond v. Crane*, 159 Mass. 577, 580; *Lloyd's v. Harper*, 16 Ch. D. 290. Executors or administrators represent the person of the deceased "more actually" than do the heirs. Co. Lit. 209 a; *Bullard v. Moor*, 158 Mass. 418, 425. Unless we are prepared to hold that assigns could sue in their own names upon this contract, we ought to adhere to the general rule, and allow the administratrices to maintain the action. For the reasons which we have given we are of opinion that the plaintiffs can maintain this suit. In *Harbeck v. Sylvester*, 13 Wend. 608, 609, not noticed in *Allen v. Culver*, an opposite decision was reached from that in *Allen v. Culver*. See also, as to collateral covenants, *Raymond v. Fitch*, 2 Cr., M. & R. 588, 599; s. c. 5 Tyrwh. 985, 996.

Judgment for the plaintiffs.

W. M. McInnes, for the defendant.

O. A. Galvin & J. F. Sweeney, for the plaintiffs.

2. UNDER THE STATUTE OF 32 HEN. VIII. C. 34. (1540)

(a) Parties.

ST. 32 HEN. VIII. C. 34. — Where before this time divers, as well temporal as ecclesiastical and religious persons, have made sundry leases, demises and grants to divers other persons, of sundry manors, lordships, fermes, meases, lands, tenements, meadows, pastures, or other hereditaments, for term of life or lives, or for term of years, by writing under their seal or seals, containing certain conditions, covenants and agreements to be performed, as well on the part and behalf of the said lessees and grantees, their executors and assigns, as on the behalf of the said lessors and grantors, their heirs and successors; (2) and forasmuch as by the common law of this realm, no stranger to any covenant, action or condition, shall take any advantage or benefit of the same, by any means or ways in the law, but only such as be parties or privies thereunto, by the reason whereof, as well all grantees of reversions, as also all grantees and patentees of the King our sovereign lord, of sundry manors, lordships, granges, fermes, meases, lands, tenements, meadows, pastures, or other hereditaments late belonging to monas-

teries, and other religious and ecclesiastical houses dissolved, suppressed, renounced, relinquished, forfeited, given up, or by other means come to the hands and possession of the King's majesty since the fourth day of February the seven and twentieth year of his most noble reign, be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors before that time might by the law have had against the same lessees for the breach of any condition, covenant or agreement comprised in the indentures of their said leases, demises and grants: (3) be it therefore enacted by the King our sovereign lord, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That as well all and every person and persons, and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of our said sovereign lord by his letters patents of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries, and other religious and ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the King's hands since the said fourth day of February the seven and twentieth year of his most noble reign, or which at any time heretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, (4) as also all other persons being grantees or assignees to or by our said sovereign lord the King, or to or by any other person or persons than the King's highness, and the heirs, executors, successors and assigns of every of them, (5) shall and may have and enjoy like advantages against the lessees, their executors, administrators and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture; (6) and also shall and may have and enjoy all and every such like, and the same advantage, benefit and remedies by action only, for not performing of other conditions, covenants or agreements contained and expressed in the indentures of their said leases, demises or grants, against all and every the said lessees and farmers and grantees, their executors, administrators and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, (7) in like manner and form as if the reversion of such lands, tenements or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the act made at the first session of this present parliament, if no such grant by letters patent had been made by his Highness.

II. Moreover be it enacted by authority aforesaid, That all farmers, lessees and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments for term of years, life or lives, their executors, administrators and assigns, shall

and may have like action, advantage and remedy against all and every person and persons and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of the King our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indentures of their lease and leases, as the same lessees, or any of them might and should have had against the said lessors and grantors, their heirs and successors; (2) all benefits and advantages of recoveries in value by reason of any warranty in deed or in law by voucher or otherwise only excepted.¹

SPENCER'S CASE.

QUEEN'S BENCH. 1583.

[Reported 5 Co. 16 a.]

SPENCER and his wife brought an action of covenant against Clark, assignee to J., assignee to S., and the case was such: Spencer and his wife by deed indented, demised a house and certain land (in the right of the wife) to S. for a term of 21 years, by which indenture S. covenanted for him, his executors, and administrators, with the plaintiffs, that he, his executors, administrators, or assigns, would build a brick wall upon part of the land demised, &c. S. assigned over his term to J., and J. to the defendant; and for not making of the brick wall the plaintiff brought the action of covenant against the defendant as assignee: and after many arguments at the bar, the case was excellently argued and debated by the justices at the bench: and in this case these points were unanimously resolved by SIR CHRISTOPHER WRAY, Chief Justice, SIR THOMAS GAWDY, and the whole court. And many differences taken and agreed concerning express covenants, and covenants in law, and which of them run with the land, and which of them are collateral, and do not go with the land, and where the assignee shall be bound without naming him, and where not; and where he shall not be bound although he be expressly named, and where not.

1. When the covenant extends to a thing *in esse*, parcel of the de-

¹ "The Statute deals only with actions by the assignee of the reversion against the lessee or his assignee, and actions by the lessee or his assignee against the assignee of the reversion; and not with actions by the lessor against the assignee of the lessee, or *e contra*, which actions seem therefore to be governed by the common law." 1 Smith, L. C. (10th ed.) 71.

On the adoption of this statute in the United States, and on the subject of this chapter in general, see Sims, Cova. 74.

A covenant on a grant for years of a profit is within the Statute. *Martyn v. Williams*, 1 H. & N. 817.

mise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee although he be not bound by express words: but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being: as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

2. It was resolved that in this case, if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing demised, that for as much as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a *Warrantia Chartæ*, F. N. B. 135, & 9 E. 2. *Garr' de Chartæ* 30, 36 E. 3. *Garr.* 1, 4 H. 8. *Dyer* 1. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.

3. It was resolved, if a man leases sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the case of a lease of personal goods there is not any privity, nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors, or administrators, who represent him. The same law, if a man demises a house and land for years, with a stock or sum of money rendering rent, and the lessee

covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee; and it is not certain that the stock or sum will come to the assignees' hands, for it may be wasted, or otherwise consumed or destroyed by the lessee, and therefore the law cannot determine at the time of the lease made, that such covenant shall bind the assignee.

4. It was resolved, that if a man makes a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch; but if a man makes a lease for years by this word *concessi* or *demisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of covenant; for the lessee and his assignee hath the yearly profits of the land which shall grow by his labor and industry for an annual rent, and therefore it is reasonable when he hath applied his labor, and employed his cost upon the land, and be evicted (whereby he loses all) that he shall take such benefit of the demise and grant, as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to.

5. Tenant by the curtesy, or any other who comes in in the *post* shall not vouch (which is in lieu of an action). But if a ward be granted by deed to a woman who takes husband, and the woman dies, the husband shall vouch by force of this word *grant*, although he comes to it by act in law. So if a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well as on the covenant in law on these words (demise or grant) as on the express covenant. The same law is of tenant by Statute-merchant or Statute-staple, or *elegit* of a term, and he, to whom a lease for years is sold by force of any execution, shall have an action of co-tenant in such case as a thing annexed to the land, although they come to the term by act in law; as if a man grants to lessee for years, that he shall have so many estovers as will serve to repair his house, or as he shall burn in his house, or the like, during the term, it is as appurtenant to the land, and shall go with it as a thing appurtenant, into whose hands soever it shall come.¹

6. If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land in whose hands soever the term shall come, as well those who come to it by act in law, as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires, that they, who

¹ On the running of covenants entered into by the lessee of the donee of a power, see *Isherwood v. Oldknow*, 3 M. & S. 332.

shall take benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenants when the lessee makes it with the lessor.

7. It was resolved, that the assignee of the assignee should have an action of covenant. So of the executors of the assignee of the assignee; so of the assignees of the executors or administrators of every assignee, for all are comprised within this word (*assignees*), for the same right which was in the testator, or intestate, shall go to his executors or administrators, as if a man makes a warranty to one, his heirs and assigns, the assignee of the assignee shall vouch, and so shall the heirs of the assignee: the same law of the assignee of the heirs of the feoffee, and of every assignee. So every one of them shall have a writ of *Warrantia Charta*. *Vide* 14 E. 3. Garr. 33. 38 E. 3. 21, 36 E. 3. Garr. 1. 13 E. 1. Garr. 93. 19 E. 2. Garr. 85, &c. For the same right, which was in the ancestor, shall descend to the heir in such case without express words of the heirs of the assignees.

Observe, reader, your old books, for they are the fountains out of which these resolutions issue, but perhaps by these differences the fountains themselves will be made more clear and profitable to those who will make use of them. For example in 42 E. 3, 3, the case is; grandfather, father, and two sons, the grandfather was seised of the manor of D. whereof a chapel was parcel, a prior with the assent of his covent by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his covent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c. The grandfather did enfeoff one of the manor in fee who gave it the younger son and his wife in tail; and it was adjudged that the tenants in tail, as terretenants (for the elder brother was heir) should have an action of covenant against the prior, for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor, as it is there said. And Finchden related, that he had seen it adjudged, that two coparceners made partition of land, and one did covenant with the other to acquit him of suit, which was due, and that coparcener to whom the covenant was made did alien, and the suit was arrear; and the feoffee brought a writ of covenant against the coparcener to acquit him of the suit; and the writ was maintainable, notwithstanding he was a stranger to the covenant, because the acquittal fell upon the land; but if such covenant were made to say divine service in the chapel of another, there the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in 2 H. 4, 6 b. But there it is agreed, that if the covenant had been with the lord of the manor of D. and his heirs, lords of the manor of D. and inhabitants therein, the covenant shall be annexed to the manor, and there the terretenant shall have the action of covenant, without privity of blood. *Vide* 29 E. 3, 48, and 30 E. 3, 14, *Simpkin Simeon's Case*, where the case was, that the Lady

Bardolf by deed granted a ward to a woman who married Simp. S., against whom the Queen brought a writ of right of ward, and they vouched the Lady Bardolf; and afterwards the wife died, by which the chattel real survived to the husband (and resolved that the writ should not abate). The vouchee appeared, and said, What have you to bind me to warranty? The husband showed, how that the lady granted to his wife before marriage the said ward; the vouchee demanded judgment for two causes.

1. Because no word of warranty was in the deed; as to that, it was adjudged that this word (*grant*) in this case of grant of a ward (being a chattel real) did import in itself a warranty.

2. Because the husband was not assignee to the wife, nor privy. As to that it was adjudged that he should vouch, for this warranty implied in this word (*grant*) is in case of a chattel real so annexed to the land that the husband who comes to it by act in law, and not as assignee, should take benefit of it. But it was resolved by Wray, Chief Justice, and the whole court, that this word (*concessi* or *demisi*) in case of freehold or inheritance doth not import any warranty. 11 H. 6, 41, *acc'*, *vide* 6 H. 4. 12 H. 4, 5. 1 H. 5, 2. 25 H. 8. Covenant Br. 32. 28 H. 8. Dyer 28. 48 E. 3, 22. F. N. B. 145. C. 146, & 181. 9 Eliz. Dyer, 257. 26 H. 8, 3. 5 H. 7, 18. 32 H. 6, 32. 22 H. 6, 51. 18 H. 3. Covenant, 30. Old N. B. Covenant, 46 H. 8, 4. 38 E. 3, 24. See the Statute of 32 H. 8, c. 24, 34, which Act was resolved to extend to covenants which touch or concern the thing demised, and not to collateral covenants.¹

BARNARD v. GODSCALL.

KING'S BENCH. 1612.

[Reported Cro. Jac. 309.]

COVENANT on an indenture of demise of a house to the defendant.

The breach assigned was, for not repairing the house within a month after warning given the first of January, 9 Jac. 1, there being an express covenant on the part of the lessee for himself, his executors and assigns, that he would repair within a month after warning.

The defendant pleads, that long time before that warning, viz. 3 Jac. 1, he assigned over his term to J. S., who had paid his rent always afterward to the plaintiff, and the plaintiff accepted thereof; and avers performance of all the covenants until the assignment.

The plaintiff thereupon demurred: for this assignment doth not take from the lessor his advantage of the express covenant; and notwithstanding

¹ See *Gorton v. Gregory*, 3 B. & S. 90; *Norman v. Wells*, 17 Wend. 136; *Hunt v. Danforth*, 2 Curt. C. C. 592, 603; *Masury v. Southworth*, 9 Ohio St. 340. But cf. *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604.

standing his acceptance of the rent by the hands of the assignee, yet he may charge the lessee or assignee at his election.

All the Court was of that opinion; wherefore, without argument, it was adjudged for the plaintiff. And WILLIAMS said he knew it to be so adjudged when he was a serjeant, upon a demurrer in the Common Pleas. And in this term there was another case, *Varnis v. Goodcheape*, where a like writ of covenant was brought against a lessee for years, on an express covenant for reparations, and such a plea pleaded, and a demurrer thereupon; and adjudged accordingly for the plaintiff.¹

¹ But after the assignment by the lessee, and acceptance of rent from the assignee, covenant only, (and not debt,) lies against the lessee. *Marsh v. Brace*, Cro. Jac. 334. See *Walker's Case*, 3 Co. 22. The principle of *Barnard v. Godscall* applies to a lessor after he has assigned the reversion. *Jones v. Parker*, 163 Mass. 564.

"Turning then to the question raised by the points, we find the facts to be as assumed therein, and the liability of the gas company to depend upon the extent to which the covenants of Guffey & Co. ran with the land. That they continued liable, notwithstanding their assignment to Robbins, is very clear. The covenant was their own, and their privity of contract with their lessors continued, notwithstanding their assignment of the lease. Their assignee, Robbins, who was in possession when the time for performance arrived, was also liable, because of the privity of estate which arose upon his acceptance of the assignment. Acquiring the leasehold estate by an assignment of the lease, he is fixed with notice of its covenants, and he takes the estate of his assignor *cum onere*. But as his liability grows out of privity of estate, it ceases when the privity ceases. If he had assigned before the time for performance, his liability would have ceased with his title, and liability would have attached to his assignee by reason of privity of estate, and so on, *toties quoties*. Each successive assignee would be liable for covenants maturing while the title was held by him because of privity of estate; but he would not be liable for those previously broken, or subsequently maturing, because of the absence of any contract relations with the lessor. While he holds the estate and enjoys its benefits, he bears its burdens, but he lays down both the estate and its burdens by an assignment, even though, as is said in some of the cases, his assignment be to a beggar.

"It is clear, therefore, that when Robbins made his assignment to the Washington Natural Gas Co., the time fixed in the lease for the sinking of the second well had gone by, and the covenant was broken. Guffey & Co. were liable upon their contract, because although their assignment had divested them of the lease, it could not relieve them from their contracts. Robbins, who was the owner when the covenant matured, was liable because of the privity of estate; but the gas company had no relations with the lessor or the leasehold until after the covenant was broken. The covenant ran with the land until the breach. It then ceased to run, because it was turned into a cause of action.

"The case of the *Bradford Oil Co. v. Blair*, 113 Pa. 88, has been cited as sustaining a contrary doctrine, but an examination of it will show that it is clearly distinguishable from this case.

"The covenant which it was sought to enforce in that case was not for the completion of successive wells at successive dates, but it was for the commencement of the work of developing Blair's farm at a time certain, and to 'continue with due diligence and without delay to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption.' Two wells were completed, and were successful oil wells. The assignee of the lease owned adjoining lands upon which it was operating, and it stopped work on the Blair farm. The action rested on the breach of the covenant to prosecute the business of producing oil from the land of the lessor with due diligence and 'without interruption.' The obligation of a covenant to prosecute the business of developing the land of the lessor without delay and without interruption, is a continuing one. The breach for which the Bradford

CONGHAM v. KING.

KING's BENCH. 1631.

[Reported Cro. Car. 221.]

COVENANT against the defendant as assignee of an assignee, for not repairing of an house let *inter alia*.

The defendant takes issue upon the mean assignment of the lease laid in the declaration.

Wright, after verdict for the plaintiff, took divers exceptions to the declaration in arrest of judgment, that the plaintiff shows the lease to be to J. S., and by him devised to J. D., and made J. N. his executor, and that he *virtute legationis* entered and assigned to W. S., and he entered and assigned one house, parcel of the premises, to the defendant, who entered and made spoil in an hall and chamber, parcel of the demised premises, &c. One exception was, Because he shows that the devisee entered and was possessed *virtute legationis*, and doth not say that the executor assented. — *Sed non allocatur*: for being alleged, that he thereof was possessed *virtute legationis*, and issue being taken upon a collateral matter, it shall be intended that he entered with the assent of the executor.

Another exception was, Because the breach was assigned in such an house parcel *præmissorum*, and doth not say *præmissorum prædimissorum*, and to him assigned; for in the lease are divers things excepted, and it may be that this is parcel of the things excepted, or not parcel of the premises assigned. — *Sed non allocatur*: for *præmissa* shall be intended *prædimissa et assignata*, and shall not be extended to any lands not *dimissa*.

Oil Co. was held liable was not that of some previous holder of the title, but its owner." WILLIAMS, J., in *Washington Natural Gas Co. v. Johnson*, 128 Pa. 576, 591 (1889). And see *Fennell v. Guffey*, 139 Pa. 341 (1891); *Mason v. Smith*, 181 Mass. 510; *Consumers' Ice Co. v. Bixler*, 84 Md. 437.

On what is a continuing breach, see *Morris v. Kennedy*, [1896] 2 Ir. R. 247.

In *Kimpton v. Walker*, 9 Vt. 191, it was held, that the words "yielding and paying" rent, in a lease, create only an implied, and not an express, covenant, and that therefore the lessee is not liable for rent after an assignment. *Sed quare*.

See *Consolidated Coal Co. v. Peers*, 166 Ill. 361.

Covenants do not run on mere equitable assignments. *Cox v. Bishop*, 8 De G., M. & G. 815.

On the running of covenants after a mortgage by the lessee, see *Trustees v. Streeter*, 64 N. H. 108.

On the running of covenants to the assigns of one of several tenants in common and covenantees, see *Thompson v. Hakewill*, 19 C. B. (N. S.) 713.

One who, by lapse of time and the operation of 3 & 4 W. IV. c. 27, (Statute of Limitations,) succeeds to the interest of a tenant, is not bound by covenants in the lease. *Tichborne v. Weir*, 67 L. T. R. 735.

The lessor, after assignment, may recover for breaches occurring before assignment, but not for those occurring after. *Stoddard v. Emery*, 128 Pa. 486.

The next exception alleged was, That the defendant is but assignee of parcel of the things demised; and then he is not chargeable with this covenant, no more than the assignee of parcel shall be charged in debt for the rent; but the action lies against the first lessee, as it is held, *Walker's Case*, 8 Co. 23. — *Sed non allocatur*: for this covenant is dividable, and follows the land, with which the defendant, as assignee, is chargeable by the common law, or by the Statute of 32 Hen. 8, c. 37. Whereupon it was adjudged for the plaintiff.

HOLFORD v. HATCH.

KING'S BENCH. 1779.

[Reported 1 Doug. 188.]

THIS was an action of covenant, for rent in arrear, brought against the defendant as assignee of one Saunders. The declaration stated (in the common form), that the plaintiff demised to Saunders for seven years, by virtue whereof he entered and was possessed, and that afterwards, *all the estate, right, title, and interest*, of Saunders, in the premises, came to the defendant, *by assignment* thereof, by virtue whereof he entered and was possessed, and that, after the assignment, rent had become due, which the defendant had not paid. The defendant pleaded, that *all the estate, right, title, and interest*, of Saunders in the premises, did not come to him by assignment thereof in manner and form as the plaintiff had alleged.

On the trial, it appeared, that the defendant was in possession of the premises during the time when the rent in arrear became due, but that, by the deed under which he held, they were conveyed to him, by Saunders, for a day, or some days less than the original term, and that he had actually surrendered them before the action was brought. Some receipts also were produced for rent which had been paid by the defendant to the plaintiff, and which run thus: "Received of Saundere by the hands of Hatch."

Upon this evidence, it was contended, at the trial, which came on before Lord Mansfield, at the sitting for Middlesex, in last Hilary Term: 1. That, in point of law, a person holding of the first lessee, by an under-lease, like the present, is not liable to be sued by the original lessor, on the covenant for rent contained in the original lease; 2. That the fact put in issue on the record, viz., that *all the estate, &c.*, of Saunders, came to the defendant, was not proved.

A verdict was found for the plaintiff, but *Lord Mansfield* saved the points made by the defendant's counsel, for the opinion of the court. Accordingly, in Hilary Term (Thursday, the 4th of February), *Davenport* obtained a rule to show cause why the verdict should not be set

aside, and a nonsuit entered. He cited *Poultney v. Holmes*, M. 7 G. 8 at N. Fr. before Pratt, Ch. Just., 1 Str. 405; *Crusos v. Bugby*, C. B. T. 11 G. 3; 3 Wils. 234; since reported 2 Blackst. 766; and *Hare v. Cator*, B. R. E. 18 G. 3.

Cause was shown on the Thursday following (the 11th of February).
The *Solicitor-General*, for the plaintiff.

Dunning and *Davenport*, for the defendant.

LORD MANSFIELD. It is fit that we should look into the authorities; therefore let the case stand over.

The court were understood to be for some time divided, and judgment was not given till this day [May 8, 1779], when Lord Mansfield delivered their unanimous opinion, as follows:

LORD MANSFIELD. This is an action of covenant by a *lessor* against an *under-lessee*, and the single question is, whether the action can be maintained against him, as being, *substantially*, an *assignee*. For some time we had great doubts; we have bestowed a great deal of consideration on the subject, and looked fully into the books, and it is clearly settled (and is agreeable to the text of Littleton), that the action cannot be maintained, unless against an assignee of the whole term.
*The rule made absolute.*¹

TWYNAM v. PICKARD.

KING'S BENCH. 1818.

[Reported 2 B. & Ald. 105.]

COVENANT. Declaration stated, that one H. N. Middleton being seised in fee of the premises, demised the same by lease to the defendant for fourteen years, and that the defendant covenanted to repair, &c. The declaration then stated the entry of the defendant upon the premises, the reversion still remaining in Middleton; that the latter by lease and release conveyed his reversion to W. H. and W. T. in fee; that they became seised of the reversion in fee, and that they on the 15th day of February, 1810, by lease and release, conveyed to the plaintiff the reversion of *part of the said demised premises*, whereby he became seised of the reversion of *that part of the premises in fee*. The declaration then alleged breaches of covenant for not repairing that part of the premises, the reversion of which had been conveyed to plaintiff. General demurrer and joinder.

Selwyn, in support of the demurrer.

Moore, contra.

¹ Cf. *Mumford v. Walker*, 85 L. T. R. 518.

On the difference between an assignment and an underlease, see *Beardman v. Wilson*, L. R. 4 C. P. 57; *McNeill v. Kendall*, 128 Mass. 245; *Stewart v. Long Island R. R. Co.*, 102 N. Y. 601; *Druks v. Lucoe*, 157 Pa. 17, 38.

BAYLEY, J. Although it has never been expressly decided that the assignee of the reversion of part of the demised premises can maintain this action against the lessee, yet, when the question comes fairly to be considered, I cannot entertain any doubt that covenant will lie both by and against the assignee of the reversion of part of the premises. The 32 H. 8, c. 34, § 1, enacts, "that the grantees or assignees of any reversion or reversions shall have the like advantages against the lessees by entry for non-payment of the rent, or for doing of waste or other forfeiture, and also shall have all such like and the same advantage, benefit, and remedies, by action only, for not performing of other conditions, covenants, or agreements contained and expressed in their leases, demises, or grants against the lessees, as the lessors or grantors themselves might have had at any time." The words therefore apply to conditions as well as to covenants, and are sufficiently large to include persons who are grantees of the reversion, either of the whole or part of the property which is the subject of the lease. That part, however, which applies to conditions which in their very nature are entire, is necessarily confined to the assignees of the reversion of the whole of the premises. The authorities cited in the course of the argument to show that the assignees of the reversion of part are not within the Act, were cases of conditions, and do not apply to covenants. I do not agree to the distinction taken in the argument between the first and second sections of the Act, for the words used in both sections are substantially the same, and must receive the same construction. The only difference is, that the words in the first section apply to the assignee of the reversion; those in the second section, to the assignee of the term. Then, except in cases where the construction of the Statute is confined by the use of the word "condition," and the nature of the thing, there is no good reason why the word "assignee" in the Statute should not be held to extend to the assignee of the reversion in part, as well as of the whole, of the premises. In *Palmer v. Edwards*, 1 Dougl. 187, it was held that the assignee of part of the premises from the lessee might maintain covenant against the lessor; and there Buller, J., considered the remedies as mutual. In *Congham v. King* [Cro. Car. 221], it was held that the lessor might maintain covenant against the assignee of part of the premises demised. These authorities seem to show that the severance of the estate demised does not take away the mutual remedies. I have always understood it to be clear law, that covenant was maintainable by the assignee of the reversion in part. In *Kitchen v. Buckley* [1 Lev. 109] this objection, if valid, would have succeeded; and it can hardly be supposed that if it had been considered valid, it would have been overlooked. In *Pyot v. Lady St. John*, Cro. Jac. 329, a person seised in fee of one messuage, and possessed of a term of years in other premises, demises both for ten years to Lady St. John, by one lease, and then, by separate deeds, conveyed the reversion in fee, and the reversion for years to Pyot. On an action of covenant being brought, it was objected that Pyot ought to have brought several actions, but no

objection was taken that he was possessed, by each separate deed, only of the reversion of part of the premises. The court held, that though he might have brought several actions, still the bringing only one action was well enough. But if this objection had been valid, that decision could not have taken place; because it would have been an obvious answer to say that several actions would not lie, inasmuch as in each it must have appeared that Pyot was only assignee of the reversion in part. Upon authority, therefore, as well as principle, I am of opinion that this action is maintainable; and, therefore, that there must be judgment for the plaintiff.

ABBOTT, J. I am of the same opinion. The Statute makes no material distinction between the assignee of the reversion and the assignee of the term. It has been decided that the assignee of part of the premises for the term may maintain this action, and it therefore appears to me to follow that the assignee of the reversion of part may do the same.

HOLBORN, J. I am also of opinion that this action is maintainable. The cases cited in argument apply only to conditions, with respect to which the Statute expressly enacts "that assignees shall have the like advantages against the lessees by entry for non-payment of rent, or for doing of waste or other forfeiture, as the lessors would have had." Now if the lessor assigned the reversion of part of the premises to another, his right of entry would be gone, for in *Knight's Case*, 5 Coke, 55 b, it was expressly held that the severance of any part of the reversion destroyed the whole condition (which was entire, and the breach of which gave one entire right of entry into the whole premises on non-payment of rent); that being so, the lessor at common law would have no right, in such a case, to vacate the lease by entry, and consequently his assignee would not have that right under the Statute. But that does not apply to the case of covenants, for there, although the lessor has granted away part of the demised premises, still at common law he might maintain covenant against the lessee; and therefore it seems to me that his assignee of part of the demised premises is entitled under the Statute to maintain that action.

*Judgment for plaintiff.*¹

¹ In *Shepherd's Touchstone*, 176, the following is stated, among the covenants of which grantees shall take advantage by the Stat. H. 8: "As where a lessee for life or years doth covenant with his heirs to keep the houses demised in good reparation, or the like, and after the lessor doth grant away the reversion of all, or part of the houses to J. S., in this case J. S. shall take advantage for any breach of the covenant in his time, but not for any breach before the time the reversion was granted." And *Pime's Case*, Mich. 8 Jac., is cited. — *REP.*

See *Atton v. Hemmings*, 2 Bulst. 281; Co. Lit. 215 a. See *SCHOLFIELD, J.*, in *Leiter v. Pike*, 127 Ill. 287, 326.

GREY v. CUTHBERTSON.

KING'S BENCH. 1785.

[Reported 2 Chitty, 482.]

DECLARATION in covenant, stating that one, William Mills, was possessed of a term of years, and that by indenture, dated 22d September, 1770, between W. Mills and plaintiff, W. Mills demised certain premises to plaintiff, *habendum* for fourteen years; and among other covenants in the lease, the declaration set forth the following one: that at the end or expiration, or other sooner determination of the said demise, a fair valuation and appraisement should be made by two indifferent persons (one to be chosen by each of the parties to the said indenture, or their respective executors, administrators, or assigns) of all and every the fruit-trees and bushes that should be then standing and growing, and which should have been planted and set by the said plaintiff, his executors, administrators, or assigns, upon the said demised premises, and that he the said plaintiff, his executors, administrators, or assigns, should yield and deliver up the same trees and bushes to the said William Mills, his executors, administrators, or assigns, at the value or appraisement thereof to be made and fixed as aforesaid; and the said William Mills, for himself, his executors and administrators, did by the said indenture, &c. (among other things), covenant to and with the said plaintiff, his executors, administrators, and assigns, that he the said William Mills, his executors or administrators, should and would well and truly pay, or cause to be paid to the said plaintiff, his executors, administrators, or assigns, immediately after such valuation or appraisement should be made by two indifferent persons, as aforesaid, all such sum or sums of money for such trees and bushes as the same trees and bushes should be valued or appraised at. The declaration then alleged plaintiff's entry, and that all the said William Mills's interest in the premises, before the expiration of the term, became vested in the defendants; and then a breach of the said covenant by the defendants as assignees.

Demurrer and joinder in demurrer.

Clayton, for the defendant.

Wood, contra.

PER CURIAM. The plaintiff is not without remedy; he may bring an action against the original lessor, who always remains liable; but his right of action for a breach of this covenant cannot be extended to an assignee without his being named in the covenant, as the subject matter of it does not relate to a thing *in esse* at the time of the demise. The court recognized the authority of *Spencer's Case*.

Judgment for the defendant.

TATEM v. CHAPLIN.

KING'S BENCH. 1793.

[Reported 2 H. Bl. 138.]

THIS was an action of covenant, brought by the lessor of a farm, against the assignee of the lessee, for the breach of the following covenant: "And the said Samuel Norfolk (the lessee) for himself, his executors and administrators, did covenant, promise, and agree, to and with the said George Tatem (the lessor), his heirs and assigns, that he the said Samuel Norfolk, his executors and administrators, should and would constantly during that demise, with his and their family and servants, reside, inhabit and dwell in and upon the said demised messuage or tenement, farm, and lands, and in default thereof, would pay or cause to be paid to the said George Tatem, his heirs or assigns, the sum of five pounds of lawful money of Great Britain, as a penalty for every month he or they did not or should not reside, inhabit, or dwell in and upon the said demised premises, over and above the yearly rent then and there reserved," &c.

The breach assigned was, "that the said Richard Chaplin (the assignee) after the said assignment of the said demised premises to the said Richard, and during his possession thereof, to wit, from the 9th day of May in the year of our Lord 1790, to the day of filing the original writ of the said George, hath not, nor did during such time as aforesaid, with himself, his family and servants, reside, inhabit, and dwell, nor does he now reside, inhabit, and dwell in *and upon the said demised messuage or tenement, farm or lands*, but on the contrary hath *totally absented* himself with his family and servants from the same, for a long space of time, to wit, for the space of two years and three months, yet the said Richard Chaplin hath not paid or caused to be paid to the said George Tatem the sum of £5 of lawful money of Great Britain, as a penalty for each and every month he the said Richard Chaplin with his family and servants as aforesaid, have not resided, inhabited, and dwelt in and upon the said demised premises, over and above the yearly rent so then and there reserved, or any part thereof, but hath therein wholly failed and made default, contrary to the form and effect of the aforesaid covenant of the said Samuel Norfolk, so made with the said George Tatem in that behalf as aforesaid," &c. To this there was a general demurrer.

There were also issues joined on the breaches of other covenants.

Runnington, Serjt., in support of the demurrer.

Bond, Serjt., *contra*.

The COURT said, though the deed was very ill drawn, they were clearly of opinion, that the covenant in question was *quodam modo* annexed

and appurtenant to the thing demised, according to the first and sixth resolutions in *Spencer's Case*, which were directly in point, and therefore that the assignee was bound, though he was not named.

Judgment for the plaintiff.

MINSHULL v. OAKES.

EXCHEQUER. 1858.

[Reported 2 H. & N. 793.]

POLLOCK, C. B.¹ Two entirely distinct questions arose in this case. The declaration was on a demise to the lessee, his executors, administrators, and assigns, in consideration of the rents and covenants on the part and behalf of the lessee and his assigns to be paid, done, and performed, of a messuage and lands, with liberty to the lessee, his executors, administrators, and assigns, to make any erections or buildings. The lessee covenanted for himself, his heirs, executors, and administrators (not saying assigns), that he, his heirs, executors, administrators, or assigns, would pay rent; and that he, his executors or administrators, would repair the messuage and farm, outhouses, barns, stable, and all other erections and buildings which should or might be thereafter erected, and all the gates, &c., and the same being so repaired, he, the lessee, his executors, administrators, and assigns, at the end of the term would yield up. There was a breach alleged, in non-repair and not yielding up in repair. The third plea was pleaded to a part of this, viz., to so much as complained in respect of a water corn mill, cottages, and other buildings erected and built during the term, and showed that they were buildings erected during the term, and not erected in place of others previously existing. It was contended that this plea was good on the authority of the first resolution in *Spencer's Case*, the lessee not having covenanted for his assigns.

The state of the authorities in question seems as follows: The proposition, that a covenant which would run with the land if the assignee were named, does not where he is not named and the thing was not in esse at the time of the making of the covenant, is laid down in *Spencer's Case*, 5 Rep. 16 a. The same is to be found in Comyns' Digest, Covt. (C.) 3, citing *Spencer's Case* and Jones, 223, which however does not support the doctrine. It is not found in Rolle. It is in Viner's Abridgment, "Covenant" (L.), where however Moor. 159, is cited as establishing the same, when in truth it established the contrary. It is negatively sanctioned by the silence of the author and editors of Smith's Leading Cases, and it is cited in *Doughty v. Rowman*, 11 Q. B. 444, where however, with submission, it was inapplicable.

¹ The opinion only is given.

There the question was if an assignee of *the reversion* was bound, which depends on different considerations. 1 Wms. Saunders, 241 d. In Shepherd's Touchstone, 180. it is thus put: "If the lessee covenant for himself, or for himself, his executors, or administrators only, to build a *new house* upon the land, the assignee is not bound;" the editor adds, because he is not named. In page 179, *Spencer's Case* is cited, but the case put is of *a new house*. A similar remark applies to *Cockson v. Cock*, Cro. Jac. 125, where a covenant to build *de novo* is called collateral. But it may not be unreasonably said that to build a new house does not "extend to the support of the thing demised." Indeed Lord Coke thought it waste. Co. Lit. 58 a. On the other hand, Moor. pl. 159, pl. 300 (which is evidently *Spencer's Case*, though the date is later), gives the decision the other way. The explanation may be that Lord Coke is reporting a variety of arguments and opinions expressed, while Moore gives the ultimate decision. *Smith v. Arnold*, 3 Salk. 4, is directly contrary; and in *Bally v. Wells*, 3 Wils. 25, the contrary is stated. No reason is given for the alleged difference between where the assignee is and is not named; on the contrary, the reason given for binding in any case an assignee not named, viz., that he takes the benefit and burden, seems equally to apply to every such case.

No doubt, as Mr. Atherton said, if the law were clearly laid down without contradiction (as he contends it is), it ought to be abided by, though no reason could be given for it. It would not be enough to justify a departure from it, that it was without a known reason; it ought to be followed, at least unless contrary and repugnant to other rules and principles. But in deciding which of two conflicting sets of authorities is correct, it is not irrelevant to look at the reason of the thing. No doubt the resolution in *Spencer's Case* has been repeatedly cited, or the same thing said as is said there; but that resolution is the foundation of the opinion; it never appears to have been acted on; on the contrary, Moor. 159, and *Smith v. Arnold* are decisions the other way. In the present case we think it sufficient to say, that as the covenant is not a covenant absolutely to do a new thing, but to do something conditionally, viz., if there are new buildings, to repair them; as when built they will be part of *the thing demised*, and consequently the covenant extends to its support, and as the covenant clearly binds the assignee to repair things *in esse* at the time of the lease, so does it also those *in posse*, and consequently the assignee is bound. There is only one covenant to repair; if the assignee is included as to part, why not as to all? On these grounds we think the third plea bad.¹

Judgment for the plaintiff.

Welsby, for the plaintiff.

Atherton (*Field* with him) for the defendant.²

¹ The rest of the opinion, relating to another point, is omitted.

² See 1 Sm. L. C. (10th ed.) 66-69; *Conover v. Smith*, 2 C. E. Green, 51.

THOMPSON v. ROSE.

NEW YORK SUPREME COURT. 1828.

[Reported 8 Cowen, 266.]

COVENANT; tried at the Dutchess Circuit, December 6th, 1826, before *Betts*, late C. Judge.

The declaration was upon a lease under seal, dated August 19th, 1812, by which the defendant demised a farm to the plaintiff for the term of ten years from the 1st of May, 1813, at a rent of twenty dollars; and he covenanted to pay the plaintiff, at the expiration of the term, for such buildings as he might erect during the term for the accommodation and pursuit of his business, the value to be fixed by men to be chosen by the parties, who mutually bound themselves to performance in the penalty of five hundred dollars. The declaration averred the erection, during the term, of a dwelling house, blacksmith shop, shed and necessary, for the value of which this action was brought. The defendant pleaded an arbitrament and award between him and the plaintiff after the end of the term, and also a release from the plaintiff; who replied, that after the buildings were erected, and before the award or release, he assigned the lease and covenant of the defendant, of which he had notice, to Richard Harcourt, who assigned to Benjamin Harcourt, for whose benefit this suit was brought; on which issue was joined.

The main question at the trial was, whether the assignments passed the covenant of the defendant. The assignment to Richard Harcourt was dated in April, 1815, by which the plaintiff sold and conveyed to Richard Harcourt all the plaintiff's right, title, interest, claim and demand, both in law and equity, and as well in possession as in expectancy, of, in and to all that certain house and lot or piece of land, &c. (the demised premises), with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining. The plaintiff also covenanted to consult R. Harcourt as to the men who were to value the improvements, and not to choose without his approbation. The assignment from Richard to Benjamin Harcourt, in 1818, was substantially like that from the plaintiff, except in wanting the clause relative to the choice of arbitrators.

The defendant having proved the arbitration and release subsequent to these assignments, and notice of them, objected that the covenant did not pass by the assignments; but the objection was overruled.

The defendant then attempted to prove a surrender of the lease by R. Harcourt, but failed; and Harcourt was received as a witness for the plaintiff.

Verdict, for the plaintiff, seven hundred and nine dollars.

S. Stevens, for the defendant.

S. Cleveland, contra.

Curia, per SUTHERLAND, J. The issues joined between the parties were, first, whether Benjamin Harcourt was the owner of the lease, and was entitled, by virtue of the assignment to him, to receive compensation for the buildings and improvements erected and made upon the demised premises, &c. 2. Whether the defendant had notice of the assignment of the lease to Richard Harcourt before the release from Thompson.

Upon the first point, it is clear that all the interest of Thompson in the leased premises, not only his right to the unexpired term, but also to compensation for the improvements, passed by his assignment to Richard Harcourt. The assignment contains a special provision upon this point, and also a covenant that Thompson, the assignor, will consult Harcourt in the selection of the individual, to be named by him, according to the provisions of the lease, to ascertain the value of those improvements.

It is equally clear that all the interest which Richard Harcourt thus acquired in the demised premises, and *the improvements thereon*, passed by his assignment to Benjamin Harcourt, for whose benefit this action is brought.

The terms in which the subject or interest intended to be assigned, is described, are, "all the right, title, interest, claim and demand, both in law and equity, and as well *in possession as in expectancy*, of the said party of the first part, of, in and to all *that certain house and lot or piece of land, situate, &c., with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining.*" The improvements or buildings for which compensation was sought by this action under the covenant in the lease, were the dwelling house, shed and blacksmith shop, which had been erected by Thompson. Now all the assignor's interest in the *house*, not only *present*, but in *expectancy*, is expressly assigned, and his interest in the other buildings passed, because they were appurtenant and belonged to the house and lot.

The judge, therefore, ruled correctly, that the assignments sufficiently supported the first issue in behalf of the plaintiff.

Notice to the defendant of the assignments of the lease to Richard and Benjamin Harcourt, before the release from Thompson was given, was clearly proved.

The action was properly brought in the name of Thompson, the original lessee. The covenant on the part of the defendant to pay for the *buildings to be erected, &c.*, is with Thompson only, and not with his assigns. The subject of the covenant was not *in esse* at the date of the lease. It was to pay for buildings *to be erected*, not to repair existing houses, sheds, &c. Such a covenant to repair, extends to the support of the thing demised, and is, *quodammodo*, annexed and appurtenant to it, and shall bind the assignee, though he be not named. But when the covenant relates to a thing which is not in being at the time of the demise, it cannot be appurtenant to the thing which hath

no being. *Spencer's Case*, 5 Co. 17. Of course, it does not run with the land. Suppose the lease had contained a covenant on the part of Thompson to erect the buildings, as well as a covenant on the part of the lessor to pay for such buildings as should be erected. *Spencer's Case* decides, beyond all doubt, that the assignees of Thompson, not being named in the covenant, would not have been bound by it; and if a covenant *to build* does not run with the land, and bind the assignees, where they are not named, it would seem to follow that a covenant on the part of the lessor to pay *for buildings to be erected*, is a personal covenant only, and not one which runs with the land. If so, the action for a breach of it must be brought in the name of the original covenantee. There is no privity, either of estate or contract, between the covenantor and the assignee.

This doctrine is recognized and supported by the case of *Lametti and others, Executors, &c. v. Anderson*, 6 Cowen, 302. The action in that case was sustained in the name of the executors of the assignee. But the assignees were expressly named in the covenant.

The plaintiff's damages were not limited to the penal sum mentioned in the lease. That principle applies only to cases of surety, except the bond be conditioned for the payment of money only. Doug. 49; 2 Bl. Rep. 1190; 6 T. R. 303; 2 T. R. 388.

The evidence was not entirely harmonious as to the value of the buildings. The jury have adopted about the medium value as established by the witnesses.

Richard Harcourt was a competent witness. He was not objected to on the ground of interest, but because he had voluntarily, as was alleged, surrendered the lease on which the action was brought, to the defendant; and was, therefore, incompetent to impeach or invalidate his own act, by sustaining the present action.

The evidence does not establish the fact of a surrender of the lease, by Richard Harcourt, with a view to its being cancelled. It was conditional, and in the expectation of receiving a deed for the demised premises upon a new contract; which contract appears never to have been carried into effect.

The lease never was, in fact, cancelled. It was produced by the plaintiff upon the trial, and must have been restored by the defendant after the alleged surrender. *Motion for new trial denied.*¹

NOTE. — On the running of a covenant with an interest by estoppel, see *Cuthbertson v. Irving*, 4 H. & N. 742; 6 H. & N. 185.

¹ See *Hansen v. Meyer*, 81 Ill. 321.

MASON v. SMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1881.

[Reported 131 Mass. 510.]

CONTRACT for money paid. Trial in the Superior Court, without a jury, before *Dewey, J.*, who allowed a bill of exceptions in substance as follows:

On December 20, 1869, Nancy J. Fuller leased to the plaintiff a parcel of land in Boston, for the term of fifteen years from January 1, 1870, by an instrument under seal and duly recorded, the lessee covenanting to pay rent and taxes. On April 8, 1870, the plaintiff assigned the lease to the defendant by an instrument under seal, written on the back of the lease, and signed by him, as follows: "Boston, April 8, 1870. In consideration of one dollar and other good and valuable considerations paid to me by T. H. Smith, the receipt whereof is hereby acknowledged, I do hereby assign to said Smith all my right, title, and interest to the within written instrument." This assignment was recorded on the same day. On March 12, 1873, the defendant, by a similar indorsement on the lease, assigned the lease to John Carney. The plaintiff had no knowledge of this assignment, and it was not recorded until June 14, 1877.

On April 10, 1876, the heir at law of Nancy J. Fuller brought an action against the plaintiff, upon the covenant in the lease for the taxes assessed upon the demised premises for the years 1872, 1873, 1874 and 1875. The plaintiff requested the defendant to defend the action; but, as he did not do so, the plaintiff defended it, and judgment was recovered against him in the sum of \$392 damages, and \$24.32 costs.

The plaintiff asked the judge to rule that the assignment of the defendant to Carney was not operative against the plaintiff in this action, he having no notice or knowledge of the same, and it not being recorded until June 14, 1877; and that the defendant was liable for all the taxes which the plaintiff had paid.

The judge refused so to rule; and ruled that the defendant was only liable for the tax for the year 1872; and ordered judgment accordingly. The plaintiff alleged exceptions.

D. F. Fitz & J. H. Sherburne, for the plaintiff.

J. B. Richardson & E. B. Hale, for the defendant.

ENDICOTT, J. It is clear that the plaintiff was liable to the lessor upon the covenants of the lease for the payment of taxes for the years 1872, 1873, 1874, 1875; although he had assigned all his right, title, and interest in the lease to the defendant in 1870, which assignment was under seal and duly acknowledged and recorded. The defendant, as assignee, would also be liable to the lessor for the taxes accruing during his term, by virtue of the privity of estate created by

the assignment. In such a case, the liability of the original lessee does not depend upon privity of estate, for he has parted with his whole interest, but upon privity of contract, and continues during the whole term; while the liability of the assignee continues only during the term he holds the legal title to the leasehold estate under his assignment. When the privity of estate thus ceases, his liability to the lessor ceases. *Farrington v. Kimball*, 126 Mass. 813, and cases cited. See *Howland v. Coffin*, 9 Pick. 52.

The plaintiff, being thus liable, was sued by the legal representative of the lessor for these unpaid taxes, and judgment having been rendered against him for the whole amount, he paid the same.

That a lessee can recover from his assignee, and also from a second assignee, the taxes accruing during their terms respectively, and which the lessee has been obliged through their default to pay to the lessor, is well settled. *Patten v. Deshon*, 1 Gray, 325; *Burnett v. Lynch*, 5 B. & C. 589; *Moule v. Garrett*, L. R. 5 Ex. 132; *S. C.* 7 Ex. 101; *Farrington v. Kimball*, *ubi supra*. The question presented in this case is whether the plaintiff is entitled to recover from the defendant, not only the taxes for 1872, when the defendant was actually in possession, but also the taxes for the following years, when Carney was in possession, to whom the defendant had transferred the lease in 1873 by an assignment, not recorded until 1877. The lease was for the term of fifteen years from January 1, 1870.

The assignee of a lessee takes the whole estate of the lessee in the premises, subject to the performance on his part of the covenants running with the land, under the terms of the lease. By accepting and entering under the assignment, the law implies a promise to perform the duties thus imposed upon him. If through his neglect or refusal to perform them, the lessee is obliged to pay rent, taxes or other sums of money to the lessor under the covenants of his lease, he may recover the same from his assignee. Whether the lessee may recover from his assignee such sums as he has been obliged to pay, arising out of the default of a second assignee to whom the first assignee has assigned all his interest, presents a very different question, in the absence of an express agreement to do so in the instrument of assignment. For the implied promise to perform the duty imposed upon him by the acceptance of the assignment must be limited to the time while he holds the estate under the assignment, and while, by virtue of his privity of estate with the lessor, he is liable to him for the performance of the covenants. In other words, the implied promise cannot include the payment of any sums, except those which as assignee he assumes, and for which, when he assigns the lease, he is no longer liable to the lessee. *Wolveridge v. Steward*, 1 Cr. & M. 644.

The presiding judge, therefore, rightly ruled that the defendant was only liable to the plaintiff for the tax of 1872.

It is immaterial that the assignment by the defendant to Carney was not recorded. The provisions of the Gen. Sta. c. 89, § 3, have no

application here; and the failure of Carney to record the assignment cannot affect the rights or liability of the defendant in this case. See *Parsons v. Spaulding*, 130 Mass. 83.

Exceptions overruled.

(b) *Subject-matter of Covenant.*

MAYHO v. BUCKHURST.

KING'S BENCH. 1617.

[*Reported Cro. Jac.* 438.]

ERROR of a judgment in the King's Bench, in a writ of covenant brought against him as assignee of one Thomas Mayho; for that the lessee covenanted to pay annually during the term of twenty-one years, twenty shillings to the churchwardens of Saint Saviour's in Southwark, and to repair the houses and leave them well repaired at the end of the term; and because the assignee did not pay the rent, nor repair the said tenements, the action was brought: and judgment being given upon a *nihil dicit*, and entire damages found, it was adjudged for the plaintiff.

And now error assigned, because the assignee is not chargeable with this covenant of the payment of an annual sum, but it is a mere collateral covenant: also, it is not well assigned; for it is not shown for what time the sum was arrear.

And all the JUSTICES and BARONS held that this declaration was not good for both causes; and therefore, the damages being entire, the judgment was reversed.¹

COLE'S CASE.

KING'S BENCH. 1692.

[*Reported 1 Salk.* 193.]

By indenture H. leases a house, excepting two rooms, and free passage to them. The lessee assigns, and the assignee disturbs the lessor

¹ See *Dolph v. White*, 12 N. Y. 296; *Lord Hastings v. Northeastern Ry. Co.*, [1898] 2 Ch. 674.

"It was put in the argument that the question here [whether a condition of re-entry in case the lessee or its assigns, being a company, should enter into liquidation, — ran with the land] turned upon a condition and not a covenant, and it was suggested that the cases dealing with covenants were therefore not authorities on the present question. I cannot assent to this view. Whether a particular covenant or condition does or does not run with the land is determined by the common law, and it is enough to say that the authorities uniformly treat them as governed by the same principles." LORD RUSSELL, C. J., in *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79, 88. And the Court of Appeal held that the condition ran, on the analogy of a covenant against assignment or a proviso for re-entry in case of the bankruptcy of the lessee.

in the passage thereto, and for this disturbance the lessor brought covenant. *Et PER CUR.* The action lies; the diversity is this, If the disturbance had been in the chamber, it is plain then no action of covenant would have lain; because it was excepted, and so not demised: *Aliter*, where the lessee agrees to let the lessor have a thing out of the demised premises, as a way, common, or other profit *apprendre*; in such case covenant lies for the disturbance. *Vide* 3 Cro. 657; Mo. 553. And this covenant goes with the tenement, and binds the assignee. Judgment *pro quer.*

CONGLETON v. PATTISON.

KING'S BENCH. 1808.

[*Reported* 10 East, 130.]

THE plaintiffs declared in covenant upon an indenture, made the 28d November, 1752, whereby they demised to John Clayton a piece of ground in Congleton called the Byflatt, and a certain slip of land, through which a watercourse was intended to be made, with liberty for making and repairing the same, and with liberty for Clayton, his executors, administrators, or assigns, to erect in the Byflatt a silk-mill, &c., *habendum* the said piece of ground and premises, &c., to Clayton, his executors, administrators, and assigns, for three hundred years from the date of the indenture; yielding and paying as therein mentioned. And Clayton covenanted for himself, his executors, administrators, and assigns, with the corporation, that he, his executors, &c., would at all times during the term, before any persons should be received as servants, workmen, or apprentices, in such silk-mill, give notice of their names to the town clerk of the borough for the time being; and if he should immediately give satisfactory information to Clayton, his executors, &c., or to the then owner or occupier of the silk-mill, that any of the persons in such notice were legally settled in any other parish or township, and not in Congleton, then they should not be received to work in the business of such silk-mill, before a certificate of the settlement of such person under the Stat. 8 & 9 W. 3, c. 30, should be given to Congleton. The declaration then stated the entry of J. Clayton, and the building of the silk-mill; and that on the 1st of January, 1790, all the estate and interest, &c., of J. Clayton in the premises duly came to and vested in the defendants by assignment, by virtue of which they entered and were possessed, &c.: and then assigned as a breach, that after the defendants became so possessed, and while they were working the silk-mill, and during the continuance of the term, they received divers persons as servants, workmen, and apprentices to work in the said mill, without giving the previous notice before mentioned to the town clerk of Congleton, and that the persons so received worked in

the said mill without any such notice, and that they had not previously gained any settlement in Congleton; by reason of which the township of Congleton had become liable to relieve them and their families, and had expended a large sum in the same, and continued liable to the burden, &c.; and that the plaintiffs had also incurred great expense in the premises, and their estate and property in the township had been lessened in value.

The defendants, after craving oyer of the indenture, by which it appeared further, that the term was granted by the corporation in consideration of £80 paid, and of a nominal yearly rent, demurred generally to the declaration.

Littledale, in support of the demurrer.

Richardson, contra.

LORD ELLENBOROUGH, C. J. This is a covenant in which the assignee is specifically named; and though it were for a thing not *in esse* at the time, yet being specifically named, it would bind him if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it. But this covenant does not affect the thing demised, in the one way or the other. It may indeed collaterally affect the lessors as to other lands they may have in possession in the same parish, by increasing the poor's rate upon them; but it cannot affect them even collaterally in respect of the demised premises during the term. How then can it affect the nature, quality, or value of the thing demised? Can it make any difference to the mills whether they are worked by persons of one parish or another; or can it affect the value of the thing at the end of the term, independently of collateral circumstances? The settling an additional number of persons in this place may, indeed, by means of the increased population, bring an increased burden at the end of the term on those who are to pay the rates; but that increase of population may also be an increased benefit of the land-owners, as it has happened within our own experience in many parts of this kingdom, the seats of manufactures, where the value of land has, in consequence, risen in a great proportion. But the covenant in question does not affect the thing demised immediately, but only, if at all, in respect of collateral circumstances; that is, through the medium of an increased population, and the increased expense of providing for them on the one hand, with the increased value of the lands to be set against it on the other hand. How then does it affect the mode of occupation? The carrying on of a particular trade on the premises may be said to do that; but where the work to be done is at all events the same, whether it be done by workmen from one parish or another cannot affect the mode of occupation. The covenant, therefore, not directly affecting the nature, quality, or value of the thing demised, nor the mode of occupying it, is a collateral covenant, which will not bind the assignee of the term, though named; and this is a question with the assignee, and not with the original lessee who entered into the covenant. In the case of *Bally v. Wells* [3 Wils. 25] the

covenant might affect the thing demised; for if the lessee of the tithe suffered any of the farmers of the parish to take their own tithes, such union of the land with the tithe might lay a foundation for claiming a *modus*, which might affect the future value of the tithes, and would immediately affect the occupation. But we cannot say that this covenant does either; and therefore it does not run with the land so as to bind the assignees.¹

Judgment for the defendant.

VERNON v. SMITH.

KING'S BENCH. 1821.

[*Reported 5 B. & Ald. 1.*]

COVENANT by the assignee of the lessor against the lessee. The declaration stated that one J. Hance, the lessor, before the time of making the lease, was lawfully possessed of the tenements and premises for the residue and remainder of a certain term of years, whereof seven years were then unexpired; which tenements and premises, with the appurtenances, then were and thence hitherto have been and still are situate within the weekly bills of mortality mentioned in the 14 G. 3, c. 78; and being so possessed thereof, he, the said J. Hance, by indenture, demised and leased to the defendant the tenements and premises, with the appurtenances, *habendum*, for seven years, at a certain rent therein mentioned; covenant by the defendant that he should and would forthwith, at his own expense, and from time to time during the term, insure in some of the public offices in London or Westminster, for the purpose of insuring houses from casualties by fire, the messuage, dwelling-house, coach-house, stable, and premises thereby demised or thereafter to be erected and built thereon, to the amount of £800, in the joint names of the defendant, his executors, administrators, or assigns, and of Robert Stone, the ground landlord of the premises, his heirs or assigns; and should and would, at the request of Hance, or of the ground landlord, their heirs or assigns, produce the policy and receipts for such insurance. The declaration set out the proviso in the lease for re-entry, on breach of any of the covenants. It then stated the defendant's entry into the premises, and that, after the making of the indenture, the term was assigned by Hance to the plaintiff. The breach assigned was, that the defendant did not insure. The second count stated, that, before the making of the demise to the defendant, in the first count mentioned, and also before and at the time of the

¹ Covenants to pay taxes on the land demised run with the land; see *Mason v. Smith*, 131 Mass. 510, *ante*, p. 341. But a covenant by a lessee to pay taxes on other lands does not run. *Gower v. Postmaster-General*, 57 L. T. R. 527.

See *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. R. 619.

making of the demise thereafter mentioned, Robert Stone was scised in fee of and in the said demised tenements, and by a certain indenture demised the same to J. Hance, *habendum*, for 85 years and six months. And that J. Hance, by that indenture, covenanted to insure the premises from fire, to the amount of three fourths of the value thereof, in the joint names of himself and Stone, with a proviso for re-entry, in case of non-performance of the covenants. It then stated, that three fourths of the value of the premises amounted to £800, and that, by reason of the said demised premises remaining uninsured, Stone brought an action of ejectment for the forfeiture, and the plaintiff was forced to pay the costs to him, amounting to £500, and also to sustain his own costs, amounting to £1000. Breach, that the defendant had not kept the covenant made by him, as stated in the first count. To this declaration, there was a general demurrer and joinder.

Comyn, in support of the demurrer.

Chitty, contra.

ABBOTT, C. J. It is not necessary, on the present occasion, to give any opinion on the effect of a covenant to insure premises situate without the limits mentioned in the 14 Geo. 3, c. 78. These premises lying within those limits, the effect of that Statute is, to enable the landlord, by application to the governors or directors of the insurance office, to have the sum insured laid out in rebuilding the premises. Now a covenant to lay out a given sum of money in rebuilding or repairing the premises, in case of damage by fire, would clearly be a covenant running with the land, that is, such a covenant as would be binding on the assignee of the lessee, and which the assignee of the lessor might enforce. Here the defendant does not covenant expressly in those words, but only that he will provide the means of having £800 ready to be laid out in rebuilding the premises in case of fire. But, connecting that covenant with the Act of Parliament, the landlord has a right to say that the money when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in rebuilding, and as beneficial for the landlord as if the tenant had expressly covenanted that he would lay out the money he received in respect of the policy upon the premises. For these reasons I think that this is a covenant running with the land, for the breach of which the assignee of the lessor may sue; and, consequently, there must be judgment for the plaintiff.

BAYLEY, J. I am clearly of opinion that the assignee of the reversion is entitled to sue upon the covenant in question. The rule is, that if the covenant respect the thing demised, and be co-extensive with the estate of the person to whom it is made, and be made with him and his assigns, it passes to his assignee. The only question in this case is, Does this covenant respect the thing demised? It is a covenant to insure the premises against damage by fire. By the operation of the 14 Geo. 3, c. 78, § 83, the effect of that insurance is not merely to put

into the pocket of the person effecting it, in case of loss, the amount of the money insured, but to entitle the owner of the estate to have that money laid out on the land; and if such be the effect of the covenant, it does affect the thing demised, as much as a covenant to repair or rebuild, in case of damage by fire. I think, therefore, that there must be judgment for the plaintiff.

HOLROYD, J. I am of the same opinion. If the covenant to insure to the amount of £800, in case of fire, could be considered as a covenant to pay a collateral sum to the lessor, the present action could not be supported; but, taking that covenant, together with the Stat. 14 G. 3, c. 78, § 83, I think that the sum insured is not to be considered as a collateral sum, but as a sum which, by operation of law, must be laid out upon the premises. It is, therefore, a covenant to do a matter which concerns the land, and falls within the rule laid down in *Spencer's Case*, and by Lord Chief Justice Wilmut in *Bally v. Wells* [3 Wils. 25]. He there lays it down thus: "Covenants in leases, extending to a thing *in esse*, parcel of the demise, run with the land, and bind the assignee, though he be not named, as to repair, &c. And if they relate to a thing not *in esse*, but yet the thing to be done is upon the land demised, as to build a new house or wall, the assignees, if named, are bound by the covenants; but if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound by such covenants; or if the lease is of sheep or other personal goods, the assignee, though named, is not bound by any covenant concerning them. The reasons why the assignees, though named, are not bound in the two last cases, are not the same. In the first case, it is because the thing covenanted to be done has not the least reference to the thing demised; it is a substantive, independent agreement, not *quodam modo*, but *null modo*, annexed or appurtenant to the thing leased. In the case of the mere personalty, the covenant doth concern and touch the thing demised; for it is to restore it or the value at the end of the term; but it doth not bind the assignee, because there is no privity, as there is in the case of a realty between the lessor and lessee and his assigns, in respect of the reversion; it is merely collateral in one case: in the other it is not collateral, but they are total strangers to one another, without any line or thread to unite and tie them together, and to constitute that privity which must subsist between debtor and creditor to support an action." And in page 346, after citing several cases, from which he deduces the principle laid down, he says: "All these cases clearly prove that 'inherent' covenants, and such as tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease, let them go where they will." In the present covenant, assigns are expressly included; and, inasmuch as the performance of the covenant would, in the event of the premises being destroyed or injured by fire, tend to the support and maintenance of the thing demised, I am

of opinion that it falls within the rule laid down by Lord C. J. Wilmot, and, consequently, that there must be judgment for the plaintiff.

BEST, J. It has been argued, from the preamble to the 83d section of the 14 G. 3, c. 78, that this provision of the Statute only applies to cases where fraud is suspected. But the enacting part of the clause goes beyond the mischief mentioned in the preamble, and is large enough to embrace this case. For, under the first branch of it, where the owner of the building requests the insurance company so to apply the money, no suspicion of fraud is necessary to make such request compulsory on the directors. Within the district, therefore, to which the Building Act applies, this covenant provides a fund for the rebuilding of the premises, which the owner has a right to require shall be applied to that purpose; and then it is clear, that the assignee has a direct interest in having the insurance kept up. But I think, also, that if the premises were in any other part of the kingdom, this would be a covenant that would pass to an assignee. A covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned. If this were not the law, the tenant would hold the estate discharged from the performance of one of the conditions on which it was granted to him. The original covenantee could not avail himself of this covenant; he sustains no loss by the destruction of the buildings, and therefore has no interest to have them insured. In *The Sudler's Company v. Badcock*, 2 Atkyns, 557, Lord Hardwicke says that Lord Chancellor King, in the case of *Lynch v. Dayrell*, held, that a person who had assigned his interest in a house before the fire happened which consumed it, had no right to the money under the policy. I cannot say whether a court of equity would take any steps to secure the application of the money insured for the benefit of the estate. I presume that if a court of equity would assist a covenantee to have money, recovered under the policy by his tenant, expended on the estate, it would render the same assistance to an assignee. If a court of equity will not interfere, either for the one or the other, still this covenant is as beneficial to an assignee as it was to the covenantee. It secures to the tenant the means of performing his covenant, and to the landlord a solvent instead of a ruined tenant. It is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate; and therefore may be said to be *beneficial to the estate*, and so directly within the principle on which covenants are made to run with the land. At the time that the 32 Hen. 8, c. 34, was passed, an immense quantity of land passed from the dissolved monasteries to the King, and from the King to the most favored and powerful of his subjects. Much of this land was on lease, and both the King and his Parliament must have been anxious that the assignees of the reversion should be in as good a situation as the lessors were. This Statute expressly enacts, "that grantees of estates shall have and enjoy the like advantages against lessees, their executors, &c., by entry for non-

payment of rent, or for doing of waste or other forfeiture, and the same benefit and remedy by action for not performing of other conditions, covenants, or agreements, as the lessors or grantors themselves might have had." Lord Coke (Co. Lit. 215 b) limits the operation of these general words to "such conditions as are incident to the reversion as rent, or for the benefit of the estate." He adds that the Statute does not extend to "covenants for payment of a sum in gross, delivery of corn, wood, or the like." A sum in gross is in the nature of a fine which belongs to the lessor, and can never be intended for an assignee. By the deliveries of corn and wood were meant deliveries of those articles at the mansion-house of the lessor, and not rents payable in corn or wood, without any stipulation as to the place where the articles were to be delivered. These deliveries at the mansion-house were inconsiderable in value, and would be of no use to the assignee, unless he became the assignee of the mansion as well as the farm. In 5 Coke, 18, it is said "that the 32 H. 8 was resolved to extend to covenants which touch or concern the thing demised, and not to collateral covenants." In *Spencer's Case*, Moore, 159, the same doctrine is laid down in the same terms, and this case is put by Gawdy, J., and assented to by all the judges and serjeants, "that a covenant that a lessor will, at the end of the term, grant another lease, runs with the land." The covenant here mentioned is not beneficial to the estate granted, in the strict sense of the words, because it has no effect until that estate is at an end, but it is beneficial to the owner, as owner, and to no other person. By the terms, *collateral covenants*, which do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate. This principle will reconcile all the cases. In *Webb v. Russell*, 3 Term Rep. 402, Lord Kenyon considers grantees or assignees to stand in the same situation, and to have the same remedy against the lessees, as heirs at law of individuals, or successors in the case of corporations, had before the Statute. For these reasons I am of opinion that the plaintiff is entitled to judgment. *Judgment for the plaintiff.*¹

VYVYAN v. ARTHUR.

KING'S BENCH. 1823.

[Reported 1 B. & C. 410.]

COVENANT by the devisee of the lessor against the administratrix of the lessee. The declaration stated that at the time of making the lease Thomas Vyvyan the lessor was seised in fee of the demised

¹ See *Thomas v. Vonkapff*, 6 G. & J. 372; *Massey v. Southworth*, 9 Ohio St. 340. Cf. *Reid v. McCrum*, 91 N. Y. 412.

tenements with the appurtenances, and also of a certain mill; and being so seised, on the 24th June, 1779, by indenture demised to N. D. Arthur, his executors, administrators, and assigns, a close of land together with certain common of pasture in the indenture described. *Habendum* for ninety-nine years, if three persons therein mentioned should so long live, yielding and paying to the lessor, his heirs and assigns, certain rents, sums of money, payments, and returns; and also doing certain suits and services in the indenture mentioned; and also doing suit to the mill of the said Thomas, his heirs and assigns, called Tregamere mill, by grinding all such corn there as should grow in or upon the close thereby demised during the term. The declaration then stated the entry of the lessee, and that the lessor being seised in fee of the reversion of the demised premises, by his will devised the same, and also the said mill, unto three persons in the will mentioned, their heirs and assigns, to the use of the plaintiff for his life; that the lessor died; and that by force of the Statute made for transferring uses into possession, the plaintiff became seised of the reversion in the demised premises and of the mill for the term of his life; that the lessee died intestate during the continuance of the term; and that administration was duly granted to the defendant; and that one of the persons for whose life the lease was granted was still living. Breach, that after the plaintiff became seised of the reversion of the demised premises and of the mill, and during the lifetime of the lessee, corn grew upon the demised premises which ought to have been ground at the mill; yet the lessee in his lifetime, and the defendant since his death, did not do suit to the mill of the plaintiff, by grinding there the corn so grown upon the demised premises, but wholly neglected so to do. To this declaration there was a general demurrer.

F. Pollock, in support of the demurrer.

Gaselee, contra.

BAYLEY, J. I am of opinion that this is a covenant which runs with the land, so as to entitle the assignee of the reversion to maintain this action, which is brought against the defendant, not as assignee, but as personal representative of the lessee. An action at the suit of the assignee of the reversion is maintainable in some cases at common law; in others, under the Statute of the 32 Hen. 8. I rather think that this case belongs to the former class. The lease contains a *reddendum*, and whatever services or suits are thereby reserved partake of the character of rent. Now, one of the services to be rendered to the lessor in this case is, that the lessee shall grind all the corn grown upon the demised premises at the lessor's mill. It is true that rent goes with the reversion of the land in respect of which it is reserved. But in this case, at the time of granting the lease, the lessor was seised in fee of the mill, as well as of the reversion of the premises devised; and, therefore, so long as the property in the mill and the reversion of the demised premises continued to be in the same person, the suit to the mill would continue to be a suit due to the owner of the reversion of the demised

premises, and would, therefore, in that respect, be in the nature of a rent. It is by no means unusual for the owner of a mansion and estate to stipulate with his tenants that they should carry coals to his mansion, and perform other similar services, and as long as the ownership of the mansion and the estate continues in the same person, those services are in the nature of rent, to be rendered to the reversioner of the lands demised. Now here, the plaintiff is the reversioner of the thing demised, and also owner of the mill. In the case cited from the 42 Ed. 3, the prior and his successors took no interest in the land, yet the covenant to sing in the chapel was held to run with the land. Here the covenantor is tenant of land to the covenantee, and the suit to be done to the mill is in respect of the land demised. It is not necessary for us to decide what the case would be if the ownership of the land demised and the mill had been severed. Here the lessor continued owner of the reversion of the demised premises and of the mill from the time of granting the lease till the time of his death, and the plaintiff, as his devisee, then became entitled to both, and now continues so. My judgment is founded entirely on the unity of title to the reversion of the land demised and to the mill.

HOLROYD, J. The case cited from the Year-books of the 42 Edw. 3, seems to me to govern the present, and is much stronger. I think this is a covenant running with the land at common law. Here the close was leased to the lessee, his executors, administrators, and assigns, yielding the rents, and doing the suits and services therein mentioned. The suits and services are to be rendered by the lessee, his executors, administrators, and assigns, to whom the lands are leased; and this suit is to be rendered to the mill of the lessor, his heirs and assigns; so that it appears to have been the intention that the assignees of the lessor and lessee should be bound, for they are expressly named, and that suit should be done to the mill as long as it continued to be the property of the lessor, his heirs or assigns. It has been said that the thing to be done does not affect the land. But it affects the profits of the land, and, generally speaking, they are considered the same thing as the land itself; for if the lessee in this case had had a mill of his own, he would still have been bound to grind the corn grown upon the demised premises at the lessor's mill, and the price paid for the grinding of such corn would be in the nature of a varying rent to the lessor, and a deduction from the profits of the lessee. But it is said that as the thing required to be done by the covenant is not to be done upon the land demised, but upon other land which might or might not continue to be the land of the lessor, it does not, therefore, respect the land demised, and, consequently, that the assignee cannot take advantage of the covenant. I am of opinion, however, that inasmuch as the thing to be done is to be done at a mill which belonged to the lessor at the time of making the lease, and which has always continued to belong to the owner of the reversion of the land demised, that the covenant to be implied from the *reddendum* is in the nature of a covenant to render a rent, and,

consequently, that it is a covenant that runs with the land. It is said that it is not in the nature of a rent, because it will not follow the reversion, for if the property in the mill and the reversion of the demised premises became severed, the service must be rendered to the owner of the mill, and not to the owner of the reversion of the demised premises. As long, however, as the mill and the reversion of the demised premises belong to the same person, the suit to the mill is a service to be rendered to the reversioner of the demised premises; and so long, therefore, it would follow the reversion, and in that respect partake of the nature of rent. Now here, at the time of granting the lease, the lessor was seised in fee of the land demised, and of the mill, and continued so seised of the latter, and of the reversion in the former, until his death, when his interest in both vested in the plaintiff as devisee. From the time of granting the lease to the present time, the grinding of the corn at the mill was in the nature of a rent to the reversioner, issuing out of and rendered in respect of the demised premises. For these reasons it appears to me that the assignee may, under the circumstances, take advantage of the covenant, and, consequently, that the plaintiff is entitled to the judgment of the court.

BEST, J. I am of the same opinion. Here, the reversion of the land demised, and the property in the mill, belonged to the lessor during his life, and at his death passed to his devisee, and they now continue united in him. At all times, therefore, the grinding of the corn at the mill in question was in the nature of a rent-service to the owner of the reversion of the demised premises. The general principle is, that if the performance of the covenant be beneficial to the reversioner in respect of the lessor's demand, and to no other person, his assignee may sue upon it; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue. I think that the performance of the covenant in this case, in the events that have occurred, would always have been beneficial to the owner of the reversion of the demised premises, and to no other person, and, therefore, that it is a covenant which runs with the land.

*Judgment for the plaintiff.*¹

WILLIAMS v. EARLE.

QUEEN'S BENCH. 1868.

[Reported L. R. 3 Q. B. 739]

BLACKBURN, J.² This is an action by the lessor against the assignee of a lease for breach of covenants in the lease, and the rule has

¹ See *White v. Southend Hotel Co.*, [1897] 1 Ch. 767.

² The opinion only is given.

been well established ever since *Spencer's Case*, 5 Rep. 16 a; 1 Sm. L. C. (6th ed.) 45, that, when covenants are contained in a lease (at all events if, as in the present case, the covenants are on behalf of the lessee and his assigns), and the covenants touch or concern the land, although the original covenants are made by the original lessee with the lessor, yet they run with the land, and there being privity of estate between the assignee and the lessor, the lessor may sue the assignee for breach of any of them. But this is only in the case of a covenant which "touches or concerns" the land.

Now the first and chief point to be determined here is, there being a covenant in the original lease by which the lessees, on behalf of themselves and their assigns, covenant with the lessor that neither they nor their assigns will assign the lease without the license of the mortgagor and mortgagee, and the defendant the assignee having assigned without their license, whether that is a covenant which touches or concerns the land, and therefore runs with it and binds the defendant.

I have been unable to perceive, after listening attentively to the argument of the counsel for the defendant, any reason why this covenant should not be considered a covenant touching and concerning the land. It is an express covenant as to who shall have and occupy the land, and it is inserted with a view that the landlord shall not be deprived of a voice as to who shall be substituted for the original lessee in the possession of the landlord's premises. It is certainly very material as touching the interest of the landlord and tenant, and touches and concerns the thing demised quite as directly as the many covenants that have been held to do so, — such as a covenant to renew a lease, which has been held to run with the land in more than one case cited in the judgment of the court in *Roe v. Hayley*, 12 East, at p. 469; or a covenant to reside in the demised premises, which was held in *Tutem v. Chaplin*, 2 H. Bl. 133, to bind the assignee though not named. Again, in *Bally v. Wells*, 3 Wils. 25, 33, a covenant not to let any of the farmers take the tithes demised without the consent of the lessor was held to run with the tithes and bind the assignee, assigns being mentioned in the covenant. And the expression made use of by the court at the end of the judgment, which Mr. Jones relied upon as showing that a covenant to assign without a license could not run with the land, seems to have no such meaning, but the contrary. The expression is, "a covenant not to assign generally must be personal and collateral, and can only bind the lessor himself, there never can be an assignee;" but the court adds, "whereas the present lease grants to executors, administrators, and assigns; and what they seem to have meant is, that when the lessee covenants, not that he will not assign without license, but that he will not assign at all, then the covenant of course does not run with the land, because the covenant is gone whether the assignment be with a license or without. But when there is a covenant that the lessee and his assigns will not assign without license, it is different, and the covenant may run with the land *toties quoties*. It seems to me,

therefore, both upon principle and authority, that the present covenant not to assign without license from the landlord from time to time, does run with the land, and consequently the defendant, the assignee, is liable for the breach.

But though there is a covenant binding on the defendant not to assign, the assignment is nevertheless operative, and the estate passed from the defendant to Banks, and the breaches of covenant which have occurred since are not breaches for which the defendant can be liable in the present form of action; anything done by the defendant on the premises since then he may be liable for in an action on the case; but the remedy on the covenants must be against the new tenant Banks. But the plaintiff is entitled to recover indirectly in the present action by way of damages for the breach of the covenant not to assign; for inasmuch as, if the covenant not to assign had not been broken, the assignee would have remained liable to the plaintiff to fulfil all these covenants, the breaches of which are mentioned in the first count, and there would have been, if he remained solvent, a complete and sufficient remedy in his liability, the defendant having assigned over to a person, who no doubt is selected because he has nothing to lose and so loses nothing by incurring the liability under the covenants, there has been damage sustained by the plaintiff by the defendant's breach of covenant not to assign, by reason of the plaintiff only having the liability of this inferior person, instead of the liability of the defendant, for the breaches of the other covenants; and the arbitrator, in assessing the damages on the second count, must put the plaintiff, as far as possible, in the same position, so far as money will do it, as if the covenant had not been broken. The arbitrator will take into consideration how much the worse the plaintiff will be both in respect of breaches of covenant already incurred, as well as in respect of breaches which may in future be incurred. The arbitrator must see what sum of money will put the plaintiff in the same position as he would have been in if the covenant not to assign the lease had not been broken, and the plaintiff had retained the liability of the defendant instead of an inferior liability. I agree with Mr. Jones that this will be a matter of some difficulty, and the parties would do well to agree that the lease shall be surrendered to the plaintiff, and then the measure of damages will be by how much worse off the plaintiff is than he would have been had the defendant continued bound as lessee all the time, as he would have been had he not broken his covenant not to assign.¹

There are some further questions for our consideration, which will be material for the arbitrator's guidance in assessing the damages, both on the first and second counts. In this form of action the defendant is only liable for a breach of covenant; and, as has been already stated, a covenant to run with the land must touch and concern the land; and it appears from the lease that there were demised, not only fixtures, but imovable things, which are mentioned in the schedule, — tools, utensils,

¹ See *Lepia v. Rogers*, [1893] 1 Q. B. 31.

and other things. And there is a covenant that the fixtures and other things should be kept in order and restored when worn out, and when restored kept in the same good working order. So far as that covenant relates to anything fixed to the land, the covenant runs with the land, and for any breach committed during the defendant's time he will be liable on the first count; and any breach which may have been committed during Banks's time, after the assignment from the defendant, will be matter to be taken into account in assessing the damages against the defendant on the second count. But as to the movable things, the covenant does not run with the land, as the mode in which they were dealt with could not have affected the land, and for anything connected with them the plaintiff cannot recover in the present form of action. For instance, a boiler, fixed to the land, though the tenant might be able to remove it at the end of the term, yet the keeping it there during the term would relate to the occupation and enjoyment of the land, and the covenant for keeping it there would run with the land. But covenants as to mere chattels cannot run with the land, and, as to such things, if the parties cannot wisely agree to refer all matters to the arbitrator, the mortgagor, who is the real plaintiff, will take advice as to bringing another action.

LUSH, J. I am of the same opinion, and have nothing to add to what my Brother Blackburn has said.

*Judgment for the plaintiff.*¹

Holker, for the plaintiff.

T. Jones, Q. C. (with him *Herschell*), for the defendant.

THOMAS v. HAYWARD.

EXCHEQUER. 1869.

[Reported *L. R. 4 Ex. 811.*]

DECLARATION by the assignee of a lease against the lessor, on a covenant in the lease, by which, the lessee having covenanted for himself, his executors, administrators, and assigns, during the continuance of the term to use and continue the demised house for the sale of spirits, the defendant, for himself, his executors, administrators, and assigns, covenanted "not to build, erect, or keep, or be interested or concerned in building, erecting, or keeping, any house for the sale of spirits or beer within the distance of half a mile from the premises thereby demised, during the continuance of the said term."

¹ See *West v. Dobb*, *L. R. 4 Q. B. 634*; 1 Sm. L. C. (10th ed.) 69.

As to what acts amount to a breach of a covenant not to assign, and of a covenant not to underlet, see *Crusoe d. Blancow v. Bugby*, 3 Wils. 234; *Doe d. Pitt v. Hogg*, 1 C. & P. 100; *In re Doyle and O'Hara's Contract*, [1899] 1 Ir. R. 118; *Gentle v. Faulkner*, 81 L. T. R. 294. Cf. *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79.

Demurrer and joinder.

Brown, Q. C., for the defendant, supported the demurrer.

Ryalls, for the plaintiff, supported the declaration.

BRAMWELL, B. The covenant does not touch or concern the thing demised. It touches the beneficial occupation of the thing, but not the thing itself; and this becomes manifest when it is considered that, supposing the lessee's covenant to carry on the sale of spirits on the premises to be discharged by agreement between the lessor and lessee, or that without such discharge, the lessee, in fact, discontinued the business, the defendant's covenant would obviously in no way concern the land. This shows that the covenant relates only to the mode of occupying the land, not to the land itself. It does not, therefore, run with the land so as to enable the plaintiff to sue upon it.

CHANNELL, B. I am of the same opinion. A covenant runs with the land only when it touches, that is, when its operation directly, and not merely collaterally, affects the thing demised. It cannot be said that this covenant does so.

CLEASBY, B. I am of the same opinion. It has been argued that this covenant falls within the second resolution in *Spencer's Case*, 5 Co. 16; 1 Sm. L. C. 45, 6th ed.; but the covenant there referred to, is described as relating to something "to be done upon some part of the thing demised," such as a new wall to be built thereon, which when built will form part of it, or to some matter otherwise distinctly and directly connected with it, such as rent issuing out of it. But the present covenant is rather within the latter part of the same resolution, where instances are given of covenants which do not run, as "to build a house upon the land of the lessor which is no parcel of the demise." This covenant concerns, not the condition of the land itself, but only the value of trade carried on there, and is in that sense collateral to the land.

Judgment for the defendant.

B. With Interests in Land other than Leasehold Estates.

1. BENEFITS.

PAKENHAM'S CASE.

COMMON PLEAS. 1368.

[*Reported Year Book, 42 Edw. III. 3, pl. 14.*]

ONE Laurence Pakenham brings a writ of covenant as heir against a prior, and alleges by his writ, that he does not keep the covenant made between one J., his ancestor, to wit, the grandfather of the plaintiff, whose heir he is, and one his [the prior's] predecessor, that the prior

and the convent would sing every week in a chapel in his manor of K., for him and his servants, &c.

Belknap. Neither the plaintiff nor his servants are living in the said manor, wherefore judgment of the writ.

Cavendish. This goes to the action, wherefore if you wish this to be your answer, we wish to imparl.

Belknap. The deed of which you have made profert means that he is to sing for him and his servants, and when he and his servants are not living within the said manor, you cannot maintain this writ.

Cavendish. Then this goes to the action, wherefore if you wish to make this answer, we wish to imparl.

And then *Belknap* did not dare to demur, but said that the plaintiff had a brother older than himself, who was heir to his ancestor, to whom the action should be given, wherefore judgment, whether you, who are a younger son, and not heir, ought to have an action.

Cavendish. The plaintiff is tenant of the manor where the singing is to be done, wherefore it is reasonable that the action should be maintained by him, wherefore judgment, and we pray damages.

Belknap. And inasmuch as you have brought your writ as heir, and you have an elder brother, judgment if you have an action as heir, &c.

Ad alium diem.

Cavendish says that the said J., great-grandfather of the plaintiff, enfeoffed one G. of M. of the said manor, who enfeoffed the plaintiff and one Alice, his wife, of the said manor, to them and to their heirs of their two bodies begotten, and for default of issue, the remainder to J. and his heirs, so the plaintiff is tenant of the manor, and to no one else does it belong to have an action except to him, wherefore judgment, and we pray our damages, and also we say, that since the seoffment the singing has been done time out of mind.

Belknap. And inasmuch as you have brought this writ as heir, and yet you do not deny, that there is a nearer heir to him who made the covenant, to whom the action should be given rather than to you, therefore we pray that you may be barred.

Cavendish. And we pray judgment, because we are tenants of the manor by purchase, and privy to the ancestor who made the covenant, and also the services have been done time out of mind, wherefore judgment.

Belknap. Although he is privy in blood, and although he has purchased the land, yet inasmuch as he has brought this writ as heir, and he is not heir, and to no one is an action of covenant given except to him who made the covenant or his heir, therefore we do not understand that an action, &c.

FYNCHEDEN, J. I have seen it here in terms adjudged that two parceners made partition of land between them, and the one parcener made a covenant with the other, to acquit her and her heirs of a suit, which was due from the land, and the parcener aliened the land to a stranger, and afterwards the suit was in arrear and the stranger brought

a writ to acquit him of the suit against the parcener, and the writ was maintained, notwithstanding he was a stranger to the covenant, so here.

Belknap. I grant it in your case, because the acquittance fell on the land, and not on the person; and here the covenant is to the person.

FYNCHEDEN, J. And if you grant me that that is law, then much more strongly in the other case, for in the case that I have mentioned of the suit, it was maintained because he was tenant of the land from which the suit was due, and so is it here, he is tenant of the manor where the chapel is, and in the chapel it is to be done, wherefore, &c.

WYCHINGHAM, J. If the king grants warren to another who is tenant of a manor, he shall have warren in the whole manor, and if he aliens the manor, yet the warren does not pass by the grant, because it is not appendant to the manor, wherefore no more here does it seem that the services are appendant to the manor.

THORPE, C. J., to *Belknap.* There are some covenants on which no man shall have an action, except the party to the covenant or his heir, and some covenants have inheritance in the land, so that he who has the land by alienation, or in some other way, shall have an action of covenant; and when you say, that he is not heir, he is privy in blood, and may be heir, and also he is tenant of the land, and it is a thing which is annexed to the chapel which is within the manor, and so annexed to the manor, and so he has said that the services have been done time out of mind, wherefore it is right that this action should be maintained.

Belknap. He has not counted in his count on such a prescription.

THORPE, C. J. Yes, he did, and we remember it.

And it is adjourned, &c. And it was said that if I let land to a man for term of life rendering certain rent, and I grant the reversion of the same land to another, and the tenant attorns, that the grantee shall have the rent, notwithstanding that he had not a specialty, and it was not denied, &c.¹

ANONYMOUS.

COMMON PLEAS. 1582.

[*Reported Moore, 179, pl. 318.*]

FLEETWOOD, Serjeant, moved in the Common Bench that a man made a feoffment in fee by deed indented, reserving rent, suit of court, and relief; and by the deed the feoffor granted that if the feoffee, his heirs or assigns, should be distrained to do more services than were

¹ See *Brewster v. Kidgill*, 12 Mod. 166, *post*, p. 584; *Milnes v. Branch*, 5 M. & S. 411, *post*, p. 594; 1 Sm. L. C. (10th ed.) 72 *et seq.*

reserved in the deed, that then it should be lawful for the feoffee, his heirs and assigns, to distrain in his [the feoffor's] manor of D., and hold the distress until he was satisfied of as much as he had sustained in damage by reason of the said distress.

The feoffee made a feoffment over.

And now he moved if the second feoffee could distrain; and the court said Yes, because the covenant ran with the land; and if the word "assigns" had not been in the deed, nevertheless the word "heirs" would have warranted distress to the assignee, by *PERYAM*, Justice.¹

LYON v. PARKER.

SUPREME JUDICIAL COURT OF MAINE. 1858.

[Reported 45 Me. 474.]

ACTION of covenant broken. In his writ, which is dated December 1, 1856, the plaintiff declares, in substance, that on the 4th day of April, 1849, the defendant by his deed, for a valuable consideration, received of Abner Coburn and others (named), owners of mills, dams and water power on Skowhegan Falls, bound and obliged himself to, and with each of the before-named persons, and to and with each of the grantees of either and all of them, and therein and thereby covenanted and agreed jointly and severally with each and all of the before-named persons, and with each and all of the grantees of either and all of them, that he would build a dam from &c., and would keep the same in perfect repair for the term of twenty years.

That plaintiff afterwards became part owner, by purchase from Abner Coburn and others, of a paper-mill and of a saw-mill, and of the water power aforesaid; that defendant has failed to perform his covenants, whereby the said plaintiff has been damaged.

The defendant pleaded the general issue and by brief statement set forth, — (1) that the plaintiff is not a party to the obligation declared upon; (2) that his co-tenants are not joined with him, nor (3) are the obligees in said bond joined in said action; (4) the performance of said writing; (5) a waiver and discharge of his covenants by the obligees in said obligation before the commencement of this suit.

At the trial the plaintiff introduced, without objection, a copy of the obligation declared upon; also deeds, from some of the obligees named in the defendant's writing, conveying to plaintiff an undivided part of certain of the mills, and of the dam and water power. Whereupon the case was withdrawn from the jury to be submitted to the full court, on report of the case by *Tenney*, C. J. And if, in the opinion of the court,

¹ See *Allen v. Culver*, 8 Denio, 284, 301.

the action is maintainable, it is to stand for trial; otherwise, the plaintiff to become nonsuit.

Abbott, for plaintiff.

Coburn and Wyman, for the defendant.

The opinion of the court was drawn up by

APPLETON, J. It appears that the defendant on April 4, 1849, by his bond of that date, "became bound and obliged jointly and severally" to Abner Coburn and others, "owners of mills, dams and water power on Skowhegan Falls," and also "unto the grantees of either or all of them" (naming the obligees in the bond), "to complete, maintain and keep in good and perfect repair, at all times, for and during twenty years from the first of April, A. D. 1849, said dam," &c., &c.

The plaintiff, as grantee of some of the obligees named in the bond, brings this action to recover damages for the injuries he has sustained by reason of the defendant's failure to perform his covenants.

It is a familiar principle of law, that a bond or contract under seal cannot be assigned so as to enable the assignee to maintain an action in his own name. If the bond had been made to Coburn and others, and their assigns, it would not be pretended that an assignee could maintain an action on it in his own name. It does not strengthen the plaintiff's right of action because his only claim as assignee arises not from an assignment upon the bond, but by deed from some of the assignees.

The defendant is a stranger to the title. He contracts with certain individuals to do work upon a dam belonging to the obligees in the bond. The covenant is personal. There is no privity of contract between the plaintiff and the defendant, for the plaintiff was no party to the bond when it was executed.

Neither is there any privity of estate. "It is not sufficient," says Lord Kenyon, in *Webb v. Russell*, 8 T. R. 402, "that a covenant is concerning the land, but in order to make it run with the land, there must be a privity of estate between the covenanting parties." There being neither privity of contract nor of title, the action is not maintainable. *Plymouth v. Carver*, 16 Pick. 183; *Hurd v. Curtis*, 19 Pick. 458.

*Plaintiff nonsuit.*¹

TENNEY, C. J., RICE, CUTTING, MAY, and GOODENOW, JJ., concurred.

¹ "To enable a covenant to run with the land so as to give the assignee its benefit, the covenantor must be the owner of the land to which the covenant relates; but the covenantor may be either a person in privity of estate with the covenantee or a stranger; while, with reference to the subject of the covenant, it is sufficient that it be for something to be done or refrained from, about, touching, concerning, or affecting the covenantee's land, (though not upon it,) if the thing covenanted for be for the benefit of the same or tend to increase its value in the hands of a holder." BERRY, J., in *Shaber v. St. Paul Water Power Co.*, 30 Minn. 179, 183 (1883).

See Sugden, V. & P. (14th ed.) 581 et seq.; 1 Sm. L. C. (10th ed.) 72 et seq.; Sims, Cov. 195 et seq.

NATIONAL BANK AT DOVER v. SEGUR.

NEW JERSEY SUPREME COURT. 1877.

[Reported 89 N. J. L. 173.]

ON demurrer to the declaration.

The articles of agreement sued on, commenced in these words, viz.: "Agreement made this, &c., between Anson G. P. Segur, of, &c., of the first part, and Hudson Hoagland, of, &c., of the second part, witnesseth."

The substance of the agreement was, that Segur would sell and convey to Hoagland a certain lot and banking-house. After this stipulation, then followed these recitals and covenants, to wit, —

"And whereas, the said Segur is now engaged in the business of banking as a private banker in Dover aforesaid; and whereas, the said Hoagland intends to associate himself with other persons to organize a banking association, to be located and to do business in Dover aforesaid, and expects to convey said lot of land and banking-house to said banking association when organized and ready to commence business, to be occupied and used by said association; and whereas, it is a part of the consideration of this sale of said lot and banking-house, that said Segur shall withdraw from the business of banking, and not engage in the same at any time within ten years in the borough of Dover aforesaid:

"Now it is further agreed between the said parties, and said Segur doth hereby covenant and agree with the said Hoagland, that as soon as said new banking company or association so expected to be organized, or any banking company to whom the said Hoagland, his heirs or assigns, may hereafter lease, convey or assign said premises and banking-house, or any part of the same, shall commence the business of banking therein, then and from thenceforth the said Segur shall withdraw in good faith, as soon as practicable, from the business of banking in said borough of Dover, and shall abstain from receiving or accepting any money on deposit as a banker therein; and shall not, at any time for the space of the ten years thereafter, engage, directly or indirectly, in the business of banking in said borough of Dover, either as a private banker, a capitalist or as a shareholder or director in or as an officer or employé of any banking company or association, or savings bank, located in or doing business in said borough of Dover; provided, that nothing herein contained shall be construed as preventing said Segur from being a shareholder in or an officer or employé of any banking company or savings bank which may, at any time, be the owner or occupant of the lot of land hereby agreed to be conveyed, or any portion thereof.

"And it is further agreed and understood that this covenant on the part of said Segur to abandon, abstain from, and not engage in the

business of banking in said borough of Dover for the period of ten years, is made for the benefit of said Hoagland, as the owner of said lot of land and banking-house, and shall attach to and run with the same in the hands of any heir or heirs, assignee or assignees, grantee or grantees of said Hoagland; and in case of any breach of the same by said Segur, an action may be maintained thereon against him by the person or persons or body corporate who shall, at the time of such breach, be the owner of the fee simple of said lot of land so hereby agreed to be conveyed; and it is further agreed, in order to insure the observance by said Segur of his said covenant, to abandon, abstain from, and not engage in the business of banking, for the period aforesaid, in Dover aforesaid, that in case of any breach thereof by him, the damages to be recovered in any action against him for such breach, shall be and they are hereby fixed and liquidated by the parties hereto at the sum of \$10,000.

"In witness whereof, the parties have hereunto set their hands and seals the day and year first above written.

(Signed)

ANSON G. P. SEGUR.

[L. s.]

H. HOAGLAND.

[L. s.]

"Signed, sealed and delivered in the presence of

Words 'according to said plans and specifications' interlined on second page, and the word 'possible' erased, and the word 'practicable,' on third page, written in its place.

(Signed,)

H. C. PITNEY."

The declaration also showed a conveyance of the premises in question from Hoagland to the plaintiff, and averred that they were still the owners thereof.

Argued at November Term, 1876, before BEASLEY, C. J., and SCUDDER, DIXON, and REED, JJ.

For the plaintiff, *H. C. Pitney*.

For the defendant, *J. Vanatta*, Attorney-General.

The opinion of the court was delivered by

BEASLEY, C. J. The contention on the part of the defence, on the argument of this demurrer, was, that the right of action disclosed in the record was not resident in the plaintiff. The deed in suit, in its commencement, purports to be made between Segur, of the first part, and Hoagland, of the second part; and it was insisted that when a sealed instrument is so conditioned, the suit must be by the formal party to it. The plaintiff is the grantee of the premises sold to Hoagland, and claims the right to enforce, in its own name, the agreement, by virtue of the last clause in it, which is to the effect that in case of a breach of the covenant now sued on, the right of action shall be in the owner in fee of the land. Two questions are thus presented to the attention of the court: First, whether, when a deed is in form *inter partes*, and it contains a covenant to a third person, such third person may sue, in his own name, for a breach of such particular covenant, it appearing in the instrument to have been the intention to confer such

right; and, second, whether such covenant exists, and such intention appears in the present instrument.

[The Chief Justice then proceeded to consider these questions, and answered them both in the affirmative. This part of the opinion is omitted. He then continued:]

But again, even if I had yielded to the view so forcibly presented to the consideration of the court, which is directly opposite to that just expressed, and had concluded that the plaintiff was not a party to this agreement, so as to give him an ability, as such, to sue upon it, yet, nevertheless, I should have thought this action maintainable.

This result, in my opinion, would have been justifiable, on the ground that the covenant forming the basis of this suit is, in law, capable of running with the land, and that, if it is to be regarded, technically, as a covenant between the formal parties to the deed, it has passed, with the title, to the present plaintiff.

The doctrine with respect to what agreements will so attach to real estate as to devolve with the title, has been a fruitful subject of discussion in the text-books, as well as in judicial opinions, and, since the various resolutions in *Spencer's Case*, has given rise to a long line of decisions, which, it must be admitted, it would be difficult entirely to harmonize. But I think this discord will be found, upon a careful examination of the authorities, to prevail chiefly in other branches of the subject than in the one in which the present case is to be classed. There is such an essential difference, in social effect, between permitting a *burden* to be annexed to the transfer of land, and the giving to a *benefit* such a quality, that the subject will unavoidably run into obscurity, unless the distinction is kept constantly in view. The conspicuous impolicy of allowing land to be trammelled in its transfer, to the extent that previous owners may choose to affect it by their contracts, was pointed out and condemned in the case of *Brewer v. Marshall*, 3 C. E. Green, 337; 4 Id. 537. In that case, the owner of real estate sold a portion of it, and covenanted with the purchaser that neither he nor his assigns would sell any marl from off the residue of the tract. The suit was against the alienee of the vendor, and the decision was that such a burden would not follow the land into the hands of such alienee of the covenantor. The reason assigned for this conclusion was the public inconvenience that would result if incidents could be annexed to land "as multifarious and as innumerable as human caprice." But when we turn our attention to the consideration of those covenants, which, instead of being burdensome to the land, are beneficial to it, we perceive, at once, that such objection does not apply. Such covenants do not hinder, but rather facilitate the transmission of land from hand to hand, and, therefore, with respect to their transmissibility, the question of public convenience has no place. This being the case, it is not easy to see why any contract, which is of a nature to attach to the land, and which has a beneficial tendency, should not be considered assignable, by act of law, as against the covenantor, with the title. In every

instance where the question, in this form, is presented, the suit being between the original covenantor and the alienee of the covenantee, if the making of the covenant be not denied, the sole point for solution would seem to be whether such covenant, in the legal sense, relates to or concerns the land, for, if not, by its quality, it passes as an incident to the property, and is enforceable in the name of the person who is owner at the time of its breach. When the covenantor has been the party sued, and the covenant admittedly related to the land, the alienee of the covenantee being the plaintiff, I think no considered case has held that such action was not maintainable. In the present case, it is conceded that the parties to the suit have these characteristics, but it is denied that the covenants are of a nature to run with the land.

It is insisted that these covenants "relate to future personal acts and omissions of the covenantor; that those acts are not to be done or omitted on the land conveyed, nor on any other land of the grantor or grantee; nor are the covenants with the heirs or assigns of Hoagland;" and, in support of these objections, the first and second resolutions in *Spencer's Case* are cited.

But none of these positions are sustained, or in any degree sanctioned, by the authority referred to, that authority being merely to the effect that a covenant will not run with the land if it relates to personality, or if it be merely collateral to the land. But I fail to find that Sir Edward Coke says anything which lends the slightest countenance to the idea that the covenant is not transmissible if it stipulates for "the future personal acts and omissions of the covenantor," or if "those acts are not to be done or omitted on the land conveyed, or on any other land of the grantor or grantee." It is true that he does declare that, in certain cases, the burden of a covenant will not fall on the assignee of the covenantor, unless such assignee be expressly referred to in the covenant; but as this suit is against the covenantor himself, and not against his assignee, that doctrine can serve no purpose in this connection.

But Lord Coke, in the case cited, states, as one of the judicial resolutions, that a covenant will not run with the land "if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort," and, consequently, the inquiry is presented with regard to the nature of the present covenants in relation to the premises conveyed; and this inquiry has been pressed, with earnestness, on the attention of the court in the brief of the counsel of the defendant. I must say, however, that but for this urgency, it would not have occurred to me that any doubt could be entertained with respect to the question. I understand that a covenant touches and concerns land when its performance confers a direct benefit on the owner of land by reason of his ownership; and, tested by such a definition, the covenant sued on has clearly such a capacity. To be sure of this, we have but to turn to the contract. That agreement is for the sale and conveyance of the premises in question, which are

described as a lot upon which is a building, adapted to the business of banking, in the course of erection, and which, it is stated, the defendant is to complete, and which was to include "a counter for the main banking-room," which "had already been ordered" by him. It is then recited that the defendant was then engaged in the business of banking, as a private banker, in Dover; and that Hoagland, the covenantee and grantor of the plaintiff, intended to associate himself with other persons to organize a banking association, to be located and to do business in Dover; and that he expected to convey said lot of land and banking-house to said banking association; and that it was a part of the consideration of the sale of said lot and banking-house, that the said defendant would withdraw from the business of banking, and would not engage in the same, at any time within ten years, in the borough of Dover. After this, follow the covenants, which lay the ground of suit, to the purport that the defendant, "as soon as the new banking company or association, so expected to be organized, or any banking company to whom the said Hoagland, his heirs or assigns, may hereafter lease, convey or assign said premises or banking-house, or any part of the same, shall commence the business of banking therein, then and from thenceforth," the said defendant "shall withdraw, in good faith, as soon as practicable, from the business of banking," &c. To this, there is superadded a stipulation that it is understood and agreed that the foregoing covenant is made for the benefit of said Hoagland, as the owner of the land to be conveyed, and is to attach to and run with the same.

In view of these stipulations and recitals, it is undeniably clear that the parties to this contract thought that the covenant in question was one which would appertain to and benefit, not merely the person of the grantee, but the land itself, which was to become his by a conveyance. Indeed, it was made such an appurtenance to the property that it was to have no effect until the business of banking was commenced upon these particular premises. Now, while it is plain that a mere personal covenant cannot, by the agreement of parties, have its nature so altered as to make it transmissible with land, nevertheless when the question is whether the given covenant does concern certain premises, the fact that such parties considered it to have such quality, should be potent in a decision of the inquiry. Since these parties must manifestly have thought that the stipulation in question gave additional value to the property, why, and on what ground, should the court declare that such was not the case? Nor is it perceived that there is any force in the suggestion that this covenant would affect, not only the business done upon these particular premises, but any other banking business that might be carried on in the vicinity, for the answer to such objection is, that such incidental effects are common to all agreements that in any wise regulate the dealings of men; and that the rule of law requiring the covenant to touch or concern the land, does not require that it shall touch or concern nothing besides. In the present instance, this cove-

nant will have an immediate, permanent, and beneficial effect upon the use to which the land is to be put, and that is sufficient to annex it to the title. To apprehend how closely this stipulation is related to these premises, we have but to observe that in case of its breach, the party directly, and for aught that the court can know, exclusively injured, will be the owner of the property at the time such breach shall occur. There is nothing in the pleadings to show that, upon such violation of this agreement, the original covenantee, or any other person but the plaintiff, has sustained, or can sustain, the least inconvenience or injury. And, finally, it should be observed that, under the circumstances of this case, it is necessary to hold that the covenant under consideration, has capacity to run with the land, in order to give damages to the only party actually grieved by its non-performance.

This conclusion is, I think, amply sustained by the decisions. It is not necessary to review them. The following seem to me directly to the point: *The Prior's Case*, reported in the seventh resolution in *Spencer's Case*, 1 Smith's Lead. Cas. 118; *Vyvyan v. Arthur's Adm'rs*, 1 Barn. & Cress. 410; *Vernon v. Smith*, 5 B. & Ald. 1; *Mayor of Congleton v. Pattison*, 10 East, 130; *Norman v. Wells*, 17 Wend. 137; 1 Smith's Lead. Cas. 142.

Having carefully examined the cases cited in the brief of the counsel of the defendant, I shall dismiss them with the observation that they seem to me plainly to be covenants relating to personalty, or covenants entirely collateral to the land, or cases pertaining to the question when covenants will pass as a *burden* with the title.

Another objection taken to this suit is, that the agreement in question, and every part of it, was prospective and executory, and at the time it was entered into, no title to the lands existed, or was transferred to Hoagland, the covenantee.

But I find no authority for this proposition. The adjudications appear, on the contrary, to show very plainly that when a covenant beneficial to land is made, it is not essential to its devolution with the title that the covenantee should have title to the land to which it relates, or that the estate should have come from the covenantor, or should have passed from him, *eo instanti*, with the inception of the covenant. When, therefore, the covenantee in this case became vested with the title, the covenant, as it touched and concerned the land, became an incident to such land, and as such, passed with it, upon conveyance, by act and operation of law.

On the one or other of these grounds, the declaration, in my opinion, must be upheld.¹

¹ See *Narcross v. James*, 140 Mass. 188, *post*, p. 442.

In *St. Louis, I. M. & S. Ry. v. O'Baugh*, 49 Ark. 418, A. granted to a railway a right of way over his land, and the railway covenanted to build its track in a certain manner. Upon A.'s death, the probate court assigned the land to his widow for a homestead. *Held*, the covenant ran with the land, and the widow was entitled to sue upon it.

2. BURDENS.

MORSE v. ALDRICH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1837.

[Reported 19 Pick. 449.]

THIS was an action of covenant. The cause was tried before *Putnam, J.*

In 1794 Stephen Cook, the defendants' ancestor, conveyed to William Hull, in fee, a tract of land in Watertown, containing about thirteen acres; with the privilege of using and improving the land and mill pond west of the same tract, for the purpose of fish ponds, baths, &c., within certain bounds described, including a portion of the grantor's mill pond; and the "full liberty of ingress, egress, and regress to and from any part of the said described land and water, to dig out and carry away the whole or any part of the soil, &c.; to build such causeways and dams as may be necessary to divide the same into six separate and distinct fish ponds."

Hull conveyed the same premises to the plaintiff.

Afterward,¹ in November, 1809, an agreement under seal was made by and between Cook and the plaintiff, in which, in consideration of the covenants on the part of the plaintiff, Cook covenants with the plaintiff, his heirs and assigns, "that he will draw off his said pond when thereto requested by said Morse, in the months of August and September, not exceeding six working days in the whole, in each year, for the purpose of giving said Morse an opportunity of digging and carrying out mud, &c., as long as there may be mud in said pond, and no longer." It was upon this clause that the present action was brought. In the same agreement are other covenants, some concerning Morse's land and Cook's mill pond, and some concerning the discontinuance and costs of certain actions then pending between Cook and Morse. Cook does not covenant, in express terms, for his heirs or assigns.

It was contended by the plaintiff that the covenant above recited was a covenant running with the land, and therefore binding upon the defendants, who derive their title to their estate as heirs of Cook, as to four fifths thereof, and as assignees by quitclaim, of one of his heirs, as to the other fifth. And this construction was supported at the trial, against the objection of the defendant. The plaintiff claimed the right to take the mud, &c., for the purpose of manuring his land.

The plaintiff requested the defendants to draw off the pond in September, 1835, in order that he might get out the mud, but the defendants refused.

The plaintiff claimed a right to dig and carry out the mud in and

¹ But see *Wheeler v. Schad*, 7 Nev. 204.

from every part of the pond ; but the defendants contended that he was limited to the line of his own land, which runs through the pond, the plaintiff owning the land on one side, and the defendants owning the land on the other side of this line. The judge ruled the point in favor of the plaintiff.

While Cook was in the occupation of the pond, the plaintiff enjoyed the privilege of taking the mud, and afterwards, whenever he requested to have the pond drawn off, until 1835. Cook died in 1833.

It was proved that the defendants made a lease of their estate, subject to the plaintiff's right to have the pond drawn off and to take the mud, according to the covenant, and that they afterwards permitted the lessee to keep up the pond, contrary to the covenant, in consideration that the lessee would permit them to have the ice which should be made on the pond.

The plaintiff proved that there was a great quantity of mud in the pond ; and the jury were directed to inquire particularly whether the damage would have been more or less if the plaintiff had been restrained to dig on his own land under the pond, for the year 1835. The jury found a verdict for the plaintiff for \$25, as the damages sustained in 1835 ; and they found that there was so great a quantity of mud upon his own land that it would have made no difference that year whether he had been restricted to his own land, or had taken mud from any other part of the pond.

The questions reserved were : 1. Whether the covenant ran with the land, and was binding upon the defendants as the heirs of the covenantor ; 2. Whether the privilege extended to the whole pond, or was restricted to the plaintiff's own land under the pond.

Mellen and Choate, for the defendants.

G. T. Bigelow, for the plaintiff.

WILDE, J., afterward drew up the opinion of the court. The defendants are charged, as the heirs of Stephen Cook, their ancestor, with the breach of a covenant made by him with the plaintiff, and the question submitted to the court is, whether this covenant is such as is binding upon the heirs of the covenantor ? And the decision of this question depends on another, namely, whether the covenant is a real covenant, running with the land, which the defendants inherit from their ancestor, the covenantor ?

It is generally true, as has been argued by the defendants' counsel, that, by the principles of the common law, the heir is not bound by the covenant of his ancestor, unless it be stipulated by the terms of the covenant that it shall be performed by the heir ; and unless assets descend to him from his ancestor sufficient to answer the charge. *Platt on Cov.* 449 ; *Dyer*, 14 a, 23 a ; *Barber v. Fox*, 2 Saund. 136. If, therefore, the heir be not named in the covenant, it will be binding only on the covenantor, his executors and administrators, although the heir may take by descent from the covenantor assets sufficient to answer the claim.

But this principle is not to be applied to real covenants running with the land granted or demised, and to which the covenants are attached for the purpose of securing to the one party the full benefit of the grant or demise, or to the other party the consideration on which the grant or demise was made. Such covenants are said to be inherent in the land, and will bind the heir or the assignee though not named. For as he is entitled to all the advantages arising from the grant or demise, it is but reasonable that he should sustain all such burdens as are annexed to the land. Platt on Cov. 65.

When a covenant is said to run with the land, it is obviously implied that he who holds the land, whether by descent from the covenantor, or by his express assignment, shall be bound by the covenant. The heir may be charged as an assignee, for he is an assignee in law, and so an executor may be charged as the assignee of the testator. *Derisley v. Custance*, 4 T. R. 75; Jac. Law Dict. *Assigns*. And a devisee may be charged in the like manner, and is entitled to the benefit of any covenant running with the land. *Kingdon v. Nottle*, 4 Maule & Selw. 53.

If then the covenant in question runs with the land, it is clear that the defendants are liable; and it is immaterial whether the heirs and assigns of the covenantor are named in the covenant, or not, *quia transit terra cum onere*. *Bally v. Wells*, 3 Wils. 29.

To create a covenant which will run with the land, it is necessary that there should be a privity of estate between the covenantor and covenantee. *Spencer's Case*, 5 Co. 16; *Cole's Case*, Salk. 196; 3 Wils. 29; *Wibb v. Russell*, 3 T. R. 402; *Keppell v. Bailey*, 2 Mylne & Keen, 517; *Vyvyan v. Arthur*, 1 Barn. & Cressw. 410. In these cases, and in most of the cases on the same subject, the covenants were between lessors and lessees; but the same privity exists between the grantor and grantee, where a grant is made of any subordinate interest in land; the reversion or residue of the estate being reserved by the grantor, all covenants in support of the grant, or in relation to the beneficial enjoyment of it, are real covenants and will bind the assignee.

This principle is decisive of the present action. It appears by the deed of Stephen Cook, the defendants' ancestor, to William Hull, that the former conveyed to the latter a tract of land adjoining the mill pond in question, "with the full and free privilege of using and improving the said mill pond within certain limits, with the full liberty of ingress and egress, to dig out and carry away the whole or any part of the soil in said pond, and to divide the same pond, as described in the deed, into six separate and distinct fish ponds."

William Hull conveyed the premises to the plaintiff; after which, disputes arose between Cook and the plaintiff relative to their respective rights, and for settling the same they entered into sundry covenants in relation to said grant, and qualifying the same; for the breach of one of which this action was brought. At the time these covenants were made, there was a privity of estate between the parties in that part of the mill pond described in the grant to Hull. The covenant in question

was made in reference to the plaintiff's right and interest under that grant, and was manifestly intended to confirm it, and to secure the plaintiff in the enjoyment thereof. This covenant, therefore, upon the principles stated, is a real covenant, running with the land, and is binding on the heirs of the covenantor.

*Judgment on the verdict.*¹

¹ In *Fitch v. Johnson*, 104 Ill. 111 (1882), A., owning a mill and a dam, conveyed to B. the mill and water power from the dam, and covenanted to keep the dam in repair. It was held that the covenant ran in favor of the purchaser of the mill from B. against the purchaser of the dam from A. The court says: "While it is true the cases are not all in harmony on this subject, yet we are of opinion that by the decided weight of authority the doctrine that covenants run with incorporeal as well as corporeal hereditaments is fully established, and where the owner of certain premises conveys a part of them, covenanting that the purchaser, his heirs and assigns, shall enjoy certain permanent rights in and with respect to the premises retained by the grantor, and also covenants in the conveyance to do and perform, from time to time, certain acts which are essential to the use and enjoyment of the purchased premises, as was done in this case, such covenant, although regarded as a burden, will be deemed to run with the servient estate, and to subject the assignee thereof to its performance. The acts embraced within the covenant being essential to the use and enjoyment of the purchased estate, it must be assumed their performance was intended by the parties to be coextensive with the estate conveyed, which was one of unlimited duration, and we are aware of no means by which such intention can be made certainly effectual except by holding, as we do, the covenant runs with the servient estate, and that the assignee thereof is personally liable thereon. The principle here announced is no new doctrine of this court. It is distinctly recognized in *Sterling Hydraulic Co. v. Williams et al.*, 66 Ill. 398; *Wiggins Ferry Co. v. Ohio and Mississippi Ry. Co.*, 94 id. 88; and also in *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 id. 230."

See also *Lydick v. B. & O. R. R. Co.*, 17 W. Va. 427; *Shaberv. St. Paul Water Co.*, 30 Minn. 179; *Randall v. Latham*, 36 Conn. 48; *Hottell v. Farmers' Protective Assn.*, 25 Colo. 67. Cf. *Carr v. Lowry's Adm.*, 27 Pa. 257.

In *Austerberry v. Oldham*, 29 Ch. Div. 760 (1885), A. conveyed the fee of a strip of land, running through the middle of his estate, to trustees, to form part of a road, and in the conveyance the trustees covenanted with A., his heirs and assigns, that they, the trustees, their heirs and assigns, would make the road and keep it in repair. The trustees made the road. A. afterwards sold his estate to the plaintiff, and the trustees sold the road to the defendants, both parties taking with notice of the covenant to repair. It was held by the Court of Appeal (COTTON, LINDLEY, and FRY, L. JJ.) that the plaintiff could not enforce the covenant against the defendants.

The opinion of LINDLEY, J., on the question of the covenant running with the land was as follows (pp. 780-788):—

"The first question which I will consider is whether that covenant runs with the land, as it is called, — whether the benefit of it runs with the land held by the plaintiff, and whether the burden of it runs with the land held by the defendants; because, if the covenant does run at law, then the plaintiff, so far as I can see, would be right as to this portion of his claim. Now, as regards the benefit running with the plaintiff's land, the covenant is, so far as the road goes, a covenant to repair the road; what I mean by that is, there is nothing in the deed which points particularly to that portion of the road which abuts upon or fronts the plaintiff's land, it is a covenant to repair the whole of the road, no distinction being made between that portion of the road which joins or abuts upon his land and the rest of the road: in other words, it is a covenant simply to make and maintain this road as a public highway; there is no covenant to do anything whatever on the plaintiff's land, and there is nothing pointing to the plaintiff's land in particular. Now it appears to me to be going a long way to say that the benefit of that covenant runs with the plaintiff's land. I do not over-

HURD v. CURTIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1837.

[Reported 19 Pick. 459.]

ACTION of covenant. The declaration recites that in 1816 an indenture of four parts was made between Simon Elliot and Solomon Curtis,

look the fact that the plaintiff as a frontager has certain rights of getting on to the road; and if this covenant had been so worded as to show that there had been an intention to grant him some particular benefit in respect of that particular part of his land, possibly we might have said that the benefit of the covenant did run with this land; but when you look at the covenant, it is a mere covenant with him, as with all adjoining owners, to make this road, a small portion of which only abuts on his land, and there is nothing specially relating to his land at all. I cannot see myself how any benefit of this covenant runs with his land.

"But it strikes me, I confess, that there is a still more formidable objection as regards the burden. Does the burden of this covenant run with the land so as to bind the defendants? The defendants have acquired the road under the trustees, and they are bound by such covenant as runs with the land. Now we come to face the difficulty: Does a covenant to repair all this road run with the land; that is, does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little, if any, bearing upon the case which we have to consider, and I am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent-charge, or some estate or interest in the land. A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it.

"It is remarkable that the authorities upon this point, when they are examined, are very few, and it is also remarkable that in no case that I know of, except one which I shall refer to presently, is there anything like authority to say that a burden of this kind will run with the land. That point has often been discussed, and I rather think the conclusion at which the editors of the last edition of *Smith's Leading Cases* have come to is right, that no case has been decided which does establish that such a burden can run with the land in the sense in which I am now using that expression. The case of *Holmes v. Buckley*, 1 Eq. C. Ab. 27, looks a little like it at first; but the observation to be made on that case I think is this: In the first place, it is quite plain that there the plaintiff had a cause of action; he was entitled to an injunction of some sort to restrain the defendants from interrupting his watercourse. The right of the plaintiff to enforce specifically the covenant to repair, or rather to cleanse the watercourse, is obscure, and we have not got the decree which was pronounced; and I confess that having only that short note of it which is to be found in '*Equity Cases Abridged*,' I fail to understand the exact grounds of that decision, specifically enforcing that covenant to cleanse. I doubt whether it was a decision to that effect; but the case is too loosely reported to be a guide on the point.

"*Morland v. Cook*, Law Rep. 6 Eq. 252, another case in which it was said that the covenant ran with the land, is intelligible on this ground, — that there was there that which amounted to the creation of a rent-charge for the repair of the sea-wall which was in question. That is intelligible enough; and if the covenant in the present case amounted to anything of the kind, of course the observations I am now making would not be applicable.

"The case before Vice-Chancellor Malins of *Cooke v. Chilcott*, 8 Ch. D. 694, has been so shaken that I cannot rely upon it as an authority at all. I think the Vice-Chancel-

of the first part, Moses Grant, of the second, Hurd, the plaintiff, and Charles Bemis, of the third, and John Ware, of the fourth, owners of

lor did intimate an opinion that the covenant there would run with the land. I confess I doubt the correctness of that opinion. He decided the case upon another point, and upon that other point only has it been followed. There is no other authority that I am aware of that such a covenant as this runs with the land, unless it is *Western v. Macdermott*, Law Rep. 1 Eq. 499; 2 Ch. 72, where the Court of Appeal did not sanction the notion that the covenant in that case ran with the land, although the covenant was a purely restrictive covenant. I am not aware of any other case which either shows, or appears to show, that a burden such as this can be annexed to land by a mere covenant, such as we have got here; and in the absence of authority it appears to me that we shall be perfectly warranted in saying that the burden of this covenant does not run with the land. After all, it is a mere personal covenant. If the parties had intended to charge this land forever, into whosoever hands it came, with the burden of repairing the road, there are ways and means known to conveyancers by which it could be done with comparative ease; all that would have been necessary would have been to create a rent-charge and charge it on the tolls, and the thing would have been done. They have not done anything of the sort, and therefore, it seems to me to show that they did not intend to have a covenant which should run with the land. That disposes of the part of the case which is perhaps the most difficult.

"The last point was this: that even if it did not run with the land at law, still, upon the authority of *Tulk v. Moxhay*, 2 Ph. 774, the defendants, having bought the land with notice of this covenant, take the land subject to it. Mr. Collins very properly did not press that upon us, because after the two recent decisions in the Court of Appeal in *Haywood v. Brunswick Permanent Benefit Building Society*, 8 Q. B. D. 408, and *London and South Western Railway Company v. Gomm*, 20 Ch. D. 562, that argument is untenable. *Tulk v. Moxhay* cannot be extended to covenants of this description. It appears to me, therefore, that upon all points the plaintiff has failed, and that the appeal ought to be dismissed, with costs."

The case of *Morland v. Cook*, L. R. 6 Eq. 252, was explained by COTTON, L. J. (p. 774), as follows:—

"Then there was another case, before the late Lord Romilly, of *Morland v. Cook*, which was relied upon; but that was really a case not turning upon that doctrine, because it was this: There was a deed of partition of land, all of which was below the sea-level, and was protected by a river or sea wall, and a covenant was entered into by the different parties to pay their proportion of the expense of repairing the sea-wall, whoever should do it; and that covenant was enforced for and against the successors of those who were parties to the deed. But in that case it appeared that there was, according to the view of the Master of the Rolls, a common law liability, independently of that covenant, to repair the sea-wall, so that it would be very different from the case of creating a new liability: the covenant there was framed in such a way as to create a grant by the different persons who took, on partition, portions of the property, of a rent-charge out of their lands, in order to provide for the expense. The covenant was in this form. The parties covenanted for themselves, &c., 'severally and respectively, in manner following, that is to say, that the charges, damages, and expenses of or attending the keeping and maintaining the walls and gutts of or belonging to the said lands, fresh marsh lands, hereditaments and premises hereby granted and released, or intended so to be, in good order and repair, shall be borne and paid by them (naming them), their respective heirs and assigns, out of the said lands and hereditaments hereby divided in proportion, and by an acre-scut to be from time to time for that purpose made thereon and payable thereout in the same proportions in ready money.' So although in terms it was a covenant, it was a covenant by these parties that the expense should be paid out of their proportions of the land by an acre-scut payable thereout in the same proportions in ready money. That is, therefore, really a grant by each of the parties of a rent-charge of so much money as would be equivalent to his proportion of the total expense of repairing the sea-wall."

the mills and mill privileges on the upper dam of Newton Lower Falls, to wit, two paper-mills and a saw-mill, with their mill privileges, on the Needham side of the river, and four paper-mills, one fulling-mill and one saw-mill with their mill privileges, on the Newton side, for the purpose of fixing the quantity of water which the several parties should have a right to draw at their respective mills and mill privileges, to regulate the use of the same, and for some other purposes therein set forth, did for themselves, their heirs, administrators, and assigns, respectively covenant and agree to and with each other and their respective heirs, administrators, and assigns, that the six paper-mills and the fulling-mill should have the first and exclusive right to the use of the water when no more ran to the paper-mills and fulling-mill then erected and used or that might be erected and used on the six paper-mill privileges and fulling-mill privilege than should be necessary to work them to advantage, and that the saw-mill owned by Hurd and Bemis should have the second right of water, or the first right to the overplus water; that all the paper-mills and the fulling-mill, then erected, or that might be erected, should be altered and built with breast-wheels, each for a power equal to carrying two paper engines, in the paper-mills, and for a power equal to carrying a fulling and wool-carding machine in the fulling-mill, that all the gates of all the mills or breast-wheels should be drawn from the same level, and should be on a level with some permanent mark, to be made by consent of the parties; that the respective parties, and their heirs and assigns, should have a right to substitute and erect any other mills, works, or machinery, in the place of those then erected, provided the new mills, works, and machinery should require no greater power than the mills, works, and machinery which the parties had a right to erect and use by virtue of the indenture. The declaration then avers that, at the time of the making of the indenture, the plaintiff was the owner of one undivided half of the saw-mill on the Newton side, and of the first right to the overplus water, and that Bemis was the owner of the other undivided half; that in 1817 Bemis conveyed his half to the plaintiff; that the two paper-mills and paper-mill privileges on the Newton side, which belonged to Elliot and Solomon Curtis, and the fulling-mill, with the privilege of water to work a fulling and wool-carding machine, which belonged to Ware, have, since the making of the indenture, been conveyed to the defendants, and these two paper-mill privileges and the fulling-mill privilege have, for eleven years last past, been used and occupied by the defendants; that the defendants had due notice and full knowledge of the covenants and agreements in the indenture set forth, on the part of Ware, Elliot, and S. Curtis, and their respective heirs, administrators and assigns, to be kept and performed, and that the same are binding upon the defendants; yet that the defendants have erected and used and now use, on their two paper-mill privileges, breast-wheels constructed for a power much more than equal to carrying two paper-engines in each of their paper-mills, to wit, for a power equal to carrying six paper-engines in each of their paper-mills, and have actually

carried the same, and on the fulling-mill privilege they have erected and used breast-wheels for a power more than equal to carrying one fulling and wool-carding machine, to wit, for a power equal to carrying four fulling and wool-carding machines, and have actually carried the same; and have also substituted and actually used in the place of the mills, works, and machinery used on the two paper-mill privileges and the fulling-mill privilege, at the time of the making of the indenture, others which require a much greater power to carry the same than those which the defendants have a right to erect and use thereon by virtue of the indenture; whereby the plaintiff has lost the use and benefit of his saw-mill and of his first right to the overplus water, as secured to him by the indenture.

The defendants demurred.

J. Mason and F. Dexter, in support of the demurrer.

Choate and G. T. Bigelow, for the plaintiff.

WILDE, J., afterward drew up the opinion of the court. The plaintiff claims damages of the defendants for a breach by them of certain covenants contained in an indenture made by and between the plaintiff and several other persons, who were owners of mills on Charles River, at Newton Lower Falls, so called, the object and intent of the indenture being to limit and regulate the use of the waters of the river at their respective mills. The defendants were not parties to the indenture, but they have since purchased of two of the covenantors their mills mentioned in the indenture, and the question is, whether they are bound as assignees by any of the covenants between the contracting parties, as is alleged in the declaration.

To make a defendant liable to an action of covenant there must be a privity between him and the plaintiff. *Bally v. Wells*, 3 Wils. 29. As there is no privity of contract between the plaintiff and the defendants, it follows that the defendants are not liable in this action, unless there is a privity of estate between them. Where such a privity exists between the covenantor and the covenantee, and the covenantor assigns his estate, the privity thereby created between the assignee and the other contracting party, renders the former liable on all such covenants as regulate the mode of occupying the estate, and the like covenants concerning the same. And so if the covenantee assigns his estate, his assignee will have the benefit of similar covenants. These covenants are annexed to the land and run with it. But if there is no privity of estate between the contracting parties, the assignee will not be bound by, nor have the benefit of, any covenants between the contracting parties, although they may relate to the land he takes by assignment or purchase from one of the parties to the contract. In such a case, the covenants are personal and are collateral to the land.

Covenants for title may be considered as an exception to the general rule, and the reason for the exception is very strong; for nothing can be more manifestly just, than that the party who loses his land by a defect of title should have the benefit of the covenants which were intended

to secure an indemnity for the loss. Such a covenant is dependent on the grant, is annexed to it, as part and parcel of the contract, and runs with the land in favor of the assigns of the grantee or covenantee; but there is no exception to the rule that no covenant will run with the land so as to bind the assignee to perform it, unless there were a privity of estate between the covenantor and covenantee. "It is not sufficient," as Lord Kenyon remarks in *Webb v. Russell*, 8 T. R. 402, "that a covenant is concerning the land, but in order to make it run with the land there must be a privity of estate between the covenanting parties." And so the law has been laid down in all the cases turning on this point ever since *Spencer's Case*.

A covenant to build a house on the land of a third person, is a mere personal covenant; but a covenant to build a house, or a new wall, on the land demised, will run with the land demised and bind the assignee, on account of the privity of estate between the covenanting parties. *Spencer's Case*, 5 Co. 16.

In *Cole's Case*, 1 Salk. 196, a house had been leased, excepting two rooms, and free passage to them. The lessee assigned, and the assignee disturbed the lessor in the passage thereto, and for this disturbance the lessor brought covenant. The action was maintained because of the privity of estate in the passage; but it is laid down as clear law, that if the disturbance had been in either of the rooms, no action of covenant would have lain, because the rooms were excepted. As to them there was no privity of estate between the parties.

In *Vyvyan v. Arthur*, 1 Barn. & Cressw. 410, the owner of a mill and certain lands had leased the latter for a term of years, yielding and paying certain rents, and also doing suit to the mill of the lessor, by grinding all such corn there as should grow upon the demised premises; and in an action of covenant brought by the assignee of the lessor of the mill and the reversion of the lands, against the lessee, it was held that the reservation of the suit to the mill was in nature of a rent service, and that the implied covenant to render it was a real covenant which would run with the land so long as the ownership of the mill and the reversion of the demised premises belonged to the same person. It seems to be difficult to reconcile this decision with the second resolution in *Spencer's Case*, and with other cases in which it has been decided that a covenant of a lessee to build a house upon the land of the lessor, not being parcel of the demise, is a collateral covenant not binding on the assignee. The distinction may be between covenants of this sort which are in the nature of rent, and those which are not. But however this may be, the decision does not impugn, but confirms the doctrine laid down in all the cases, that the assignee is not bound by, nor is he entitled to the benefit of a covenant, unless there is a privity of estate between the covenanting parties.

Considering this principle as well established by the cases cited, and many others not adverted to, we are of opinion that this action cannot be maintained, as there was no privity of estate between the covenant-

ing parties. Their estates were several, and there was no grant of any interest in the real estate of either party to which the covenants could be annexed. The stipulations in the indenture cannot be construed as grants and covenants at the same time. If they were grants, then an action of covenant is not the proper remedy for the violation of them; and if covenants, the assignee is not bound, for want of privity of estate between the parties.

Nor can one covenant be considered as a grant, and the other as a covenant, for the stipulations are mutual, and if one is to be construed as a grant, the other should be construed in the same manner. If the stipulation that one party is to have the first preference of the use of the water for certain mills, is to be construed as a grant, the like stipulation, that the other party shall have the second preference, cannot consistently be construed as a covenant. And we ought not to give a strained construction to the indenture, for the purpose of extending the obligation of the contract to those who were not parties thereto. All the stipulations are covenants in form, were doubtless considered as such by the contracting parties, and must be so construed. As such they are mere personal covenants, according to all the authorities, and cannot be otherwise construed, without determining that all covenants concerning lands are real covenants, and binding on the assignee, however remote; which certainly cannot be maintained, either upon authority or upon principle. Such an extension of the obligation of covenants might be productive of great mischief and confusion of rights and obligations of the purchasers and owners of real estate.

*Declaration adjudged insufficient.*¹

GILMER v. MOBILE AND MONTGOMERY RAILWAY CO.

SUPREME COURT OF ALABAMA. 1885.

[Reported 79 Ala. 569.]

THIS action was brought by George N. Gilmer, against the Mobile and Montgomery Railway Company, as the assignee and successor of the Alabama and Florida Railroad Company, to recover damages for alleged breaches of covenant; and was commenced on the 30th March, 1885. The covenants alleged to have been broken were contained in a written instrument under seal, dated March 7th, 1868, by which the Alabama and Florida Railroad Company, "in consideration," as therein recited, "of George N. Gilmer having sold and conveyed to said railroad company, for the sum of one dollar, the right of way and the land for fifty feet on each side of the centre line of said railroad extending

¹ Followed in *Lawrence v. Whitney*, 115 N. Y. 410, 416; *Horn v. Miller*, 136 Pa. 840, *contra*.

through his plantation, and certain other privileges mentioned in the deed of conveyance given by said Gilmer," agreed and bound itself as follows: "The Alabama and Florida Railroad Company will stop the passenger and freight trains (when proper signals are given) at some convenient point opposite the house of said Gilmer, and receive and discharge (without extra charge) passengers and the sacked and baled produce of the farm, or other freight or produce of said farm, when the receiving and delivery of said other freight and produce can be done without seriously interfering with the running of schedule. The further privilege is given said Gilmer to cultivate such parts of said right of way not used by said railroad company, so long as the same may not interfere with the wants and requirements of said railroad company; and further, if at any time the said railroad company should erect a depot on said right of way, the sale of ardent spirits will be strictly prohibited." The complaint claimed that these stipulations were covenants running with the land, and were binding on the defendant as the assignee and successor of said Alabama and Florida Railroad Company; and alleged specific breaches of each. The court sustained a demurrer to the complaint, on the ground that the covenants were not binding on the defendant as assignee; and the judgment on the demurrers is now assigned as error.

Troy, Tompkins & London, and Macdonald & Ferguson, for the appellant.

Watts & Son, contra.

SOMERVILLE, J. The action is one at law for the breach of certain covenants entered into with the plaintiff by the Alabama and Florida Railroad Company, a body corporate, from which the defendant derived title, as assignee, to a strip of land, including the right of way, through the farm of the plaintiff, situated in the county of Lowndes. In March, 1868, the appellant, who was plaintiff in the court below, conveyed to the said assignor of defendant this right of way and land, extending fifty feet on each side of the centre line of the railroad track. In consideration of this grant, the said Alabama and Florida Railroad Company agreed in substance, by a separate instrument, to establish what we may briefly denominate a *flag-station* on said land; at a convenient point adjacent to the plaintiff's house, where both passenger and freight trains would stop, upon the giving of proper and usual signals, for the transportation of passengers and certain kinds of produce. The plaintiff was to have the right to cultivate so much of this right of way as may not be needed for use by the railroad, and so long as such cultivation did not interfere with its wants and requirements. It was further stipulated that, in the event of a depot being erected on the premises, the sale of ardent spirits would be strictly prohibited.

It is averred that the defendant corporation derived title by succession from the original vendee and covenantor, with full knowledge of the obligations growing out of the contract.

The Circuit Court sustained a demurrer to the complaint, and dismissed the action, on plaintiff's refusal to amend.

There is an agreement of counsel waiving so much of the demurrer as raises any question touching the plaintiff's right to bring the action in his name, if it would lie at all upon the facts stated. The consideration of this point we, therefore, pretermitt, assuming that the action was properly brought in the name of the plaintiff as husband, for the use of the wife.

The question for decision is, whether the covenants in question, or either of them, so run with the land, as to be of binding obligation at law upon the defendant, as the assignee of the covenantor.

A covenant is said "to run with land" when the liability to perform it, on the one hand, or the right to enforce it, on the other, passes to the vendee, or other assignee of the land. Such covenant must relate to, or, as is more commonly said, "touch and concern the land," and not as merely collateral to it, in order that the assignee of the land may be charged with their benefit or burden. *Spencer's Case*, Smith Lead. Cas. 27. They are often called real contracts, because they are annexed or inhere to the realty as part and parcel of it, and "pass from hand to hand with the interest in the realty they are annexed to." 1 Addison Contr. § 480. And no doubt seems to exist as to the rule, that covenants may run with incorporeal, as well as with corporeal hereditaments, as in the case of tithes and rent-charges, which savor of the realty, because they are carved out of and charged on it. 2 Sugden Vend. 482. It is impossible to lay down any fixed rule by which to distinguish in all cases real covenants, which run with land, and are binding as such on heirs, devisees, and assignees, from those which are merely personal, and are binding only on the covenantor and his personal representative. The subject is one full of intricate learning, and the decisions of the courts touching it are greatly conflicting, and far from satisfactory. Among those, however, which have been decided to follow the realty into the hands of an assignee, are covenants of warranty and for quiet enjoyment, covenants by tenants to pay rent, to repair, maintain fences, reside on the premises, or cultivate the demised lands in a particular manner; not to carry on a particular trade on the premises leased or purchased; not to build on adjacent premises, and many others of an analogous character. Among those adjudged to be personal, and not therefore to touch or concern the land, are covenants made by owners of land between whom and the covenantee there is no privity of title or estate; a covenant not to hire persons of a certain description to work in a mill; or a covenant with a stranger not to permit a grist-mill to be erected on the owner's premises; a covenant by the vendor of lands not to permit marl to be sold from adjoining lands; by a lessee of a house to pay so much for every tun of wine sold in the house; or to buy all beer used by him from his lessors or from his successors in trade. Law Real Property (Boone), § 317; 1 Addison Contr. § 486; 2 Greenl. Ev., § 240; 1 Parsons' Contr. 231-233.

We cite two familiar cases only to illustrate the want of harmony in the decisions. In *Taylor v. Owens*, 2 Blackf. (Ind.) s. c., 20 Amer. Dec. 115, the owner of a town site made a lease in which he covenanted that the lessee should have the exclusive right to sell merchandise in the town for ten years. It was held that the covenant did not run with the land, so as to be binding on subsequent purchasers of other town lots from the lessor. In *Norman v. Wells*, 17 Wend. 187, the defendant leased a mill-site to one from whom the plaintiff took by assignment, covenanting not to erect a rival mill on the same stream passing through his, the lessor's land. This was held to be a covenant running with the land, although it was to do something off the land demised, because it affected its value. It is observed by Mr. Washburn, that "such covenants, and such only run with the land, as concern the land itself, in whosoever hands it may be, and become united with and form a part of the consideration for which the land, or some interest in it, is parted with between the covenantor and covenantee." 2 Wash. Real Prop. (4th Ed.) 286 (16). And this is, perhaps, a correct principle.

As the class of covenants under consideration are annexed to the realty, and pass with it to the assignee as incident to it, the rule prevails, that there must be some privity of estate or of contract between the plaintiff and the defendant, before a covenant relating to land can be of binding force on the assignee of the covenantor, and that usually the covenantee must have some interest in the land, to which the covenantor's promise may be annexed; otherwise there would be nothing with which the covenant could run, or to which it could adhere as an incident. A distinction is sought to be made, between the *burdens* and the *benefits* of such covenants; the assertion being made in the notes to *Spencer's Case*, *supra*, that, at common law, the *burden* of covenants never run with land, save where there was a privity of estate between the covenantee and the covenantor—in other words, where there was a conveyance from one to the other—while the *benefit* might, in all cases, run without such privity or conveyance. 1 Smith's Leading Cases, 127, note. The soundness of this rule may be questioned, and there are numerous cases holding to the contrary; for, as said by Selden, J., in *Van Rensselaer v. Road*, 26 N. Y. 558, 574, "it has often been held, that covenants, both in their benefits and their burdens, run with the land where no tenure, in its strict sense, exists between the parties." But the necessities of the case in hand do not require us to discuss this particular branch of the subject. Here, as we shall show, there is a privity of estate between the parties litigant; and that fact brings the case within the rule, that the burdens imposed on the land by the covenantor might follow it into the hands of the defendant as assignee and purchaser.

The question arises, what is the nature of that privity of estate which the law requires in order that the covenants may run with the lands. It is now settled among other rules, contrary to the earlier view of the subject, that the relationship between the parties need not

be that of landlord and tenant, although this is clearly sufficient, and presents the most frequent instance of the application of the principle. There are well considered cases to be found, where land has been conveyed to vendees, charged with the payment of a perpetual "rent-charge," and the purchasers or assignees from such vendees have been held liable in covenant for the annual rents, and the right to sue has been decided to enure to the assignees of the rent; and this on the principle, that "the common ligament, the estate charged, unites the parties in interest as privies." *Van Rensselaer v. Read*, 26 N. Y. 558. But, however this may be, there can be, in our opinion, no doubt as to the soundness of the principle, that this privity sufficiently exists, if the covenantee retains or acquires an easement, or interest in the nature of an easement, appurtenant to the lands to which the covenant relates; and this, whether such easement is acquired by grant or reservation, in either of which modes it may be created. *Bronson v. Coffin*, 108 Mass. 175; s. c., 11 Amer. Rep. 335. Such easement is a privilege which the owner of one tenement has a lawful right to enjoy, in respect to that tenement, in or over the tenement of another person; and is usually created by imposing an obligation upon the owner of the servient tenement, in favor of the dominant estate, either to suffer something to be done, or to abstain from doing something, on or about the premises. 4 Kent's Com. 419; Washb. Easements, 4-5; *Robbins v. Webb*, 77 Ala. 176; s. c., 68 Ala. 398; *Parsons v. Johnson*, 68 N. Y. 62; s. c., 23 Amer. Rep. 149.

We think, in this case, the plaintiff retained an interest in the land conveyed to the assignor of the defendant, which was in the nature of an easement. He not only imposed a servitude upon the land, by a prohibition against the sale of ardent spirits on the premises, but retained the right to cultivate it under certain conditions and circumstances; thus retaining an interest in the realty which would preserve the privity of estate in it, and to which the covenant of defendant would attach, or become annexed.

A proper application of these principles leads us to the conclusion, that the condition assumed by the Alabama and Florida Railroad Company, the defendant's assignor, by which it was agreed to establish a "flag-station" on the road adjacent to plaintiff's house, and to permit plaintiff to cultivate the land on which the right of way was granted, imposed a burden on the land itself, and was not a mere personal covenant. It touched and concerned the land itself, and was not collateral to it, because it was to be performed on it, and affected the value of the adjacent land of the grantor, being greatly beneficial to it; and was in the nature of compensation by way of rent for the land conveyed, no other consideration having been paid therefor than that which was confessedly nominal. 1 Smith's Lead. Cases, 22-27, and note, with cases cited. Its performance or non-performance, also, affected the mode of enjoyment of the granted premises, and their value or quality, so as to render the title acquired by the vendee a subordinate one;

and this is one of the tests by which to decide whether the covenant is inherent in the land itself. 1 Addison on Contracts, § 435. In other words, the covenant of the vendee "qualified the estate which he took, and attached itself to that estate." *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; s. c., 13 Amer. Rep. 556. Without consuming time to review the adjudged cases, we refer to the following authorities in support of this conclusion: *Morse v. Aldrich*, 19 Pick. 449; *Bronson v. Coffin*, 11 Amer. Rep. 335; *Wollscroft v. Morton*, 15 Wisc. 198; *Norman v. Wells*, 17 Wendell, 136; *Van Rensselaer v. Read*, 26 N. Y. 558; *Trustees of Watertown v. Cowen*, 4 Paige, 510; 15 Stm. Eng. Ch. 228; 1 Smith's Leading Cases, 27, and notes; *Fulton v. Stuart*, 15 Amer. Dec. 542, and notes; *Webb v. Robbins*, 68 Ala. 293, and 77 Ala. 176; *Dorsey v. St. Louis Railroad Co.*, 18 Ill. 65; *Southern R. R. Co. v. Reeves*, 64 Ga. 492; *Lydick v. B. & O. Railroad Co.*, 17 W. Va. 427; *Norfleet v. Cromwell*, 16 Amer. Rep. 787.

The thing to be done by the covenantor in this case related to the land, and, being annexed to it, the assignee, by accepting possession of the land, became bound by the covenant, as one running with the land, without being named in the agreement. *Fulton v. Stuart*, *supra*; *Taylor on Landlord & Tenant*, § 437; *Spencer's Case*, above cited; *Morse v. Aldrich*, 19 Pick. 446; 1 Add. Contracts, Morgan's ed., § 455.

There is a class of cases, unlike the present, in which courts of equity intervene for the establishment and enforcement of easements, whether created by deed or covenant, by assuming jurisdiction in the nature of that for specific performance. These we do not propose to discuss, but merely observe, that equity will enforce easements or servitudes of this nature, against purchasers with notice, as a burden or charge on the servient estate, although the plaintiff could not sue at law upon the covenant creating such servitude; in other words, even though the covenant does not, in the strict sense of the term, "run with the land." *Trustees v. Lynch*, 70 N. Y. 449, or 26 Amer. Rep. 615; *Pomeroy's Equity*, §§ 692, 1303, 1347; 3 Parsons on Contracts, 353, note k.

The averments of the complaint were sufficiently certain to recover nominal damages for the alleged breach of covenant; and this would be sufficient on demurrer. We need not, therefore, discuss the other assignments of error.

The court below erred in sustaining the demurrer to the complaint; and the judgment must be reversed, and the cause remanded.¹

¹ See *Doty v. R. R.*, 103 Tenn. 564.

In *Wiggins Ferry Co. v. Ohio & Miss. R. Co.*, 94 Ill. 83 (1879), a ferry company, owning land independent of its ferry, granted to a railroad company certain easements over said land, and the railroad company, in consideration thereof, covenanted with the ferry company always to employ the ferry company to carry its freight and passengers across the river. The franchises and property of the railroad company were assigned to another company. It was held that the covenant did not run against the latter company.

3. COVENANTS FOR PARTY WALLS.

SAVAGE v. MASON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1849.

[Reported 3 Cush. 500.]

ALL the facts in this case sufficiently appear in the opinion of the court; except that the conveyance, therein mentioned, from the heirs of Benjamin Joy, to John F. Loring and Henry Andrews, of the 5th of January, 1835, was one of the defective conveyances, mentioned in the case of *Sohier v. The Massachusetts General Hospital*, 3 Cush. 483; so that the plaintiffs, as to a portion of the estate, to which they derived title from Loring and Andrews, were seised only of an estate for the life of one of the female devisees of Benjamin Joy.

The case was argued by *J. A. Andrew*, for the plaintiffs, and by *B. Rand*, for the defendant.

FLETCHER, J. This is an action of covenant. The plaintiffs put into the case an indenture, of which the following are extracts:—

“This indenture of four parts, made and concluded the first day of June, 1826, by and between Harrison Gray Otis, Jonathan Mason, Benjamin Joy, and William Sullivan, Esquires, all of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, witnesseth: Whereas the above-named parties are before the ensealment of these presents seised in fee as tenants in common of sundry pieces or lots of land, situated at said Boston, in the westerly part thereof, on the slope of what is known by the name of Mount Vernon, and bordering on Pinckney Street, Cedar or George Street, and on Sumner, formerly called Olive Street, which pieces or lots are delineated on the annexed plan, and which are hereinafter particularly described, and which pieces or lots of land they have agreed to divide between them, so that each of the said parties may hold his part thereof in severalty, to him, his heirs and assigns forever, as is hereinafter particularly expressed and declared, It is therefore hereby covenanted and agreed by and between the said parties, and their heirs, executors, administrators, and assigns, that they will hereafter stand seised of the premises in severalty, in the manner following:”

The indenture then proceeds to describe particularly the pieces and lots of land set out and conveyed in severalty to each of the said parties, and, after describing the same, contains the following clause:

“And it is hereby agreed, and each of the said parties, for himself severally, and for his heirs, executors, administrators, and assigns, covenants and agrees with the other parties, jointly and severally, and with their and each of their heirs, executors, administrators, and

assigns, that the following shall be regarded as perpetual and fundamental covenants, conditions, and articles, in the partition by these presents made, and deemed to run with the land hereby divided, and that all deeds, grants, leases, conveyances, or other instruments, whatsoever, to be made by either of said parties, or their heirs or assigns, of or concerning the land or any part of it, hereby set off and divided to him in severalty, and all buildings thereon to be erected, shall be and forever remain subject to all and singular the said covenants, conditions, and articles, by each of them, their heirs and assigns to be faithfully kept and performed."

The third of these perpetual, fundamental covenants which were to run with the land, as before expressed, was as follows:—

"Third, the centre of party walls, of every brick or stone building, may be placed upon the lines dividing said lots from contiguous lots, and the owner of such contiguous lots, whenever he shall make use of the same, in any building, shall pay [for] one half of the wall by him so used."

In this partition among the parties to the indenture, lot numbered thirty-six on Pinckney Street was set off and conveyed to Benjamin Joy, with the covenants and agreements aforesaid.

It appeared, that this lot numbered thirty-six was conveyed by the heirs of Joy, on the 5th of January, 1835, to John F. Loring and Henry Andrews, and by Loring and Andrews, by a deed dated November 29, 1839, to Ezekiel W. Pike, "together with all the rights, easements, and privileges thereto belonging, subject to all the conditions and restrictions contained in a certain deed of division made between H. G. Otis and others, dated," &c. Pike entered upon and took possession of the lot, under the deed to him, and built a brick dwelling-house thereupon, and placed the centre of the party wall of the westerly side of the house upon the line dividing lot thirty-six from the contiguous lot thirty-seven, on the plan referred to in the indenture.

Pike, by a deed dated December 1, 1840, conveyed lot numbered thirty-six to Luther S. Cushing and wife, "together with all the rights, easements, and privileges thereto belonging, and the house thereon standing, and subject to all the restrictions and conditions contained in a certain deed of division made between H. G. Otis and others," &c. Cushing and wife, by a deed dated December 1, 1841, conveyed the same estate to the plaintiffs, "together with the said dwelling-house, with all the rights, easements, and privileges thereto belonging, and subject to all the conditions and restrictions" referred to in the said last above-named deed. The plaintiffs thus trace a title to themselves to lot numbered thirty-six from the said Benjamin Joy.

It further appeared, that in the partition made by the indenture above mentioned, lot numbered thirty-seven, which was contiguous to lot numbered thirty-six, was set off and conveyed to Jonathan Mason, named in the indenture, with the covenants and agreements aforesaid, and that the same lot numbered thirty-seven was set off to the defend-

ant, as one of the heirs of the said Jonathan Mason, upon a division of his estate.

It was also in evidence, that while the defendant held and was the owner of lot numbered thirty-seven, set off to him as aforesaid, a brick dwelling-house was erected thereupon, the easterly wall of which was the wall of the plaintiffs' house, the centre of the westerly side of which had been placed upon the party line, as aforesaid, on or before the first day of July, 1844, and the wall of the plaintiff's house thereupon and thereafter used.

On the 23d of December, 1845, a formal demand was made by the plaintiffs upon the defendant, for the value of the wall so used, which not being paid, this suit was brought to recover one half the value of the partition wall belonging to the plaintiffs, according to the covenant and provision in the indenture of partition.

It appeared, further, that by an agreement dated March 11th, 1844, between the defendant and Joseph Lincoln and Eber Taylor, the defendant agreed to convey lot numbered thirty-seven to them, at any time within three years from the 11th of March, 1844, upon the performance of their undertaking to build a brick dwelling-house on the same lot within a time specified, and to pay the defendant for the lot a specified sum at a time stated.

By a deed dated November 8th, 1844, the defendant conveyed lot numbered thirty-seven to Lincoln and Taylor, with the dwelling-house by them erected thereon, subject to all and singular the covenants, conditions, and articles contained in the indenture of partition between H. G. Otis and others.

It appeared, that the sum of \$300, the agreed value of one half of said wall, was paid by Lincoln and Taylor, under a bond of indemnity, to Ezekiel W. Pike, above mentioned, after the completion of the house on lot numbered thirty-seven, in September, 1844.

Several points were stated in the argument, but the only one which requires any consideration, and the one on which the decision turns, is, whether the covenant in the indenture of partition, in regard to the wall of buildings to be placed on the lines dividing the lots, and providing for the use of and payment for such wall, and on which covenant this action is founded, is a covenant running with the land.

A mere statement of the covenant would seem sufficient to remove all doubt or question on this point. In the indenture of partition, the several parties agree and bind themselves and their representatives, that certain covenants, conditions, and articles therein contained shall be regarded as perpetual and fundamental, and deemed to run with the land thereby divided, and that all conveyances or other instruments whatsoever, to be made of or concerning the land, or any part of it, and all buildings thereon to be erected, shall be and forever remain subject to all and singular the said covenants, conditions and articles.

The third of these perpetual and fundamental covenants, which the parties expressly declared should run with the land, provides that the

centre of party walls of every brick or stone building may be placed upon the lines dividing said lots from contiguous lots, and that the owner of such contiguous lot, whenever he shall make use of the same in any building, shall pay for one-half of the wall by him so used.

The intention of the parties to the indenture, that this covenant should run with the land, is express and clear. The provision in question is a most reasonable one, and no doubt was considered by the parties, and in fact is, highly beneficial, and not burdensome, to the land.

A covenant is said to run with the land, when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. The liability to perform, and the right to take advantage of, this covenant, both pass to the heir or assignee of the land, to which the covenant is attached. This covenant can by no means be considered as merely personal, or collateral, and detached from the land. There was a privity of estate between the covenanting parties in the land to which the covenant was annexed. The covenant is in terms between the parties and their respective heirs and assigns; it has direct and immediate reference to the land; it relates to the mode of occupying and enjoying the land; it is beneficial to the owner as owner, and to no other person; it is in truth inherent in and attached to the land, and necessarily goes with the land into the hands of the heir or assignee.

According to the report of the case, the defendant must be defaulted.¹

¹ "We concede the general doctrine, as contended for by appellant's counsel, that where the relation of landlord and tenant does not exist, only such covenants as are beneficial to the estate will run with the land; but we do not regard the doctrine as applicable to cases where adjacent proprietors have, as in the present case, so contracted as to create mutual easements upon each other's estates, and entered into covenants with respect to the same. The new relation thus created, being of an intimate character, involving reciprocal duties with respect to each other's estates, may be regarded as an equivalent for the absence of tenure, so as to give effect to all covenants without regard to whether they are beneficial or onerous. However this may be, it is clear the rule contended for does not seem to be applied in this class of cases." *Roche v. Ullman*, 104 Ill. 11, 20 (1882).

See *Richardson v. Tobey*, 121 Mass. 457; *Sharp v. Cheatham*, 88 Mo. 496.

"Where one party covenants with another in respect of land, and at the same time with and as a part of making the covenant neither parts with or receives any title or interest in the land, nor creates an easement or a right in the nature of an easement for the benefit of the land, such a covenant is at best but a mere personal contract.

"In the present case the agreement created an easement of use and support in favor of each lot-owner, and her successors in title, in the half of the wall which stood on the other lot, and in the land under the same. Each lot of land became entitled, therefore, to the benefits and subject to the burdens arising from the covenants contained in the agreement, and relating to the erection and maintenance of the wall. They inhered in and belonged to it. The burdens and the benefits were inseparably connected, and the defendant could no more avoid paying to the successors in title of Mrs. Burt for one half of the wall when he sought to use it, than he could prevent the wall from standing when it had been built, assuming that it was built one half on each lot. In this view of the case it is not necessary to consider whether the defendant would be liable, as upon an undertaking to pay the cost of one half of the wall to whosoever should be the owner of the adjoining lot when he should desire to use

JOY v. BOSTON PENNY SAVINGS BANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1874.

[Reported 115 Mass. 60.]

CONTRACT to recover one half the cost of a division wall used by the defendant.

In the Superior Court the following facts were agreed:

"The plaintiff is the owner of the estate on Washington Street, in Boston, described in the deed of Amos A. Lawrence to him, dated April 11, 1866, and recorded with Suffolk deeds, lib. 875, folio 187. Lawrence derived his title to said estate from Gideon Currier, by deed, dated August 13, 1864, and recorded with Suffolk deeds, lib. 847, folio 63. The defendant corporation is the owner of the adjoining estate, which is described in the deed of Job A. Turner and others to it, dated July 8, 1867, and recorded with Suffolk deeds, lib. 904, folio 172. Turner and others acquired their title to the estate under the deed from Hiram Johnson, dated November 21, 1866, and recorded with Suffolk deeds, lib. 889, folio 241.

"It is also agreed, if the evidence is admissible and competent against any objections and exceptions which the defendant could take thereto, that before Currier had acquired by deed his title to the land now owned by the plaintiff, but after he had bargained therefor and taken a bond for the conveyance thereof to him upon the performance by him of the conditions of the bond, Johnson signed and delivered to Currier a paper writing, dated November 7, 1857, whereby Johnson, in consideration of one dollar paid by Currier, covenanted and agreed to and with Currier, his heirs and assigns, 'that the said Currier may erect or cause to be erected one half the stone and brick wall which he is about to build on the dividing line between the estate belonging to said Hiram Johnson, . . . and estate of said Currier, . . . and that I, the said Hiram Johnson, will my heirs and assigns pay or cause to be paid to said Currier, his heirs or assigns, one half the cost of erecting said wall, whenever, and as soon as I, my heirs, or assigns, shall use the same.' This instrument was not under seal, and it was not acknowledged, but it was recorded with Suffolk deeds, lib. 880, folio 58, on June 9, 1866. The deeds under which the plaintiff derived his title made no mention of the division wall. The deeds under which the defendant derived its title, described the estate as bounded by a line running through the middle the half of the wall on his side." *Morton, J., in King v. Wight*, 155 Mass. 144, 147 (1892).

See also *Standish v. Lawrence*, 111 Mass. 111; *Pfeiffer v. Matthews*, 161 Mass. 487; *First Nat. Bank v. Security Bank*, 61 Minn. 25; *Nat. Life Ins. Co. v. Lee*, 75 Minn. 157.

of the brick partition wall, 'which wall was built by said Currier, one half on the granted land, and one half on his land according to an agreement recorded with Suffolk deeds, lib. 880, folio 58.' Currier erected a building on the land now owned by the plaintiff, placing one wall thereof, one half on this land and one half on the land now owned by the defendant, before he conveyed his estate to Lawrence as aforesaid. The defendant, after its purchase of its estate as aforesaid, erected a building thereon, and made use of the wall built by Currier partly on each of the two estates as aforesaid."

On the foregoing facts the Superior Court rendered judgment for the defendant, and the plaintiff appealed to this court.

J. P. Healey, for the plaintiff.

A. C. Clark, for the defendant.

WELLS, J. By his contract with Johnson, and subsequent erection of a wall upon the division line, Currier acquired no interest in the adjoining land, and retained no title in that part of the wall which extended beyond his own line. He could not hold it as realty, because he had nothing but a simple contract, which could have no greater force in law than as a license; nor as personalty, because, by the terms of the agreement under which he built the wall, it was not removable, but intended to become permanent and annexed to each lot as real property. The plaintiff therefore, by acquiring Currier's interest in the land, acquired no interest in that part of the division wall which rested upon the adjoining lot. Even if the defendant, by reason of the clause in the deeds by which its title was derived referring to the contract, and by the use of the wall, might be held chargeable for the cost of the half so used, there is no privity of contract or estate which will enable the plaintiff to recover it in an action at law. The contract was merely a personal one with Currier. The right to enforce it would not pass with the land as an appurtenance, and there is nothing in Currier's deed to show an intent that it should pass; nor is such a contract assignable at law.

The case differs essentially from *Maine v. Cumston*, 98 Mass. 317, and *Standish v. Lawrence*, 111 Mass. 111. The plaintiff shows no right to recover, and the judgment for the defendant is

*Affirmed.*¹

¹ See *Maine v. Cumston*, 98 Mass. 317; *Richardson v. Tobey*, 121 Mass. 457; *Tomblin v. Fisk*, 18 Bradw. 439.

"Cases, therefore, where parties are, by the deed under which they take title, given one half of a wall as a party wall *when or upon condition* of making payment, and cases in which the owner of one lot has licensed the owner of the adjoining lot to build a wall for himself, resting one half of it on each lot, and reserving the privilege of thereafter purchasing one half the wall as a party wall, are not analogous. In all such cases the title to the whole wall may be regarded as appurtenant to the lot of the builder, and so passing, by every conveyance of it, until a severance of the half by the payment of the purchase money. The sale of the half of the wall does not occur, nor the title to it pass, in those cases, until the payment is made; and so necessarily it is, constructively, a sale by the assignee of so much of the wall. His right to the purchase money is not because he is the assignee of a covenant running

CONDUITT v. ROSS.

SUPREME COURT OF INDIANA. 1885.

[Reported 102 Ind. 186.]

FROM the Marion Superior Court.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, and W. S. Shirley for appellant.

J. M. Judah and O. B. Jameson, for appellee.

MITCHELL, J. On the 26th day of April, 1875, Julia A. Ross and John Hauck were the owners of adjoining lots in the city of Indianapolis. Pursuant to a written agreement entered into by Mrs. Ross and her husband on the one part, and Mr. Hauck on the other, she placed one half the width of the south wall of a four-story brick and stone building which she erected on her lot, on the north margin of the Hauck lot. After erecting the building, she conveyed the lot, with the improvements thereon, to George P. Bissell, reserving, by a stipulation contained in her deed, the right to receive compensation from adjoining property owners for the building, or use of existing party walls. Subsequently the appellant became the owner of the Hauck lot, and in 1882 commenced the erection of a building thereon, and attached the same to and used the wall erected by Mrs. Ross. Refusing to make payment, this suit was commenced to recover one half the original cost of the wall. Upon issues made a trial was had, which resulted in a finding and judgment for the plaintiff.

Counsel for appellant rest their argument for a reversal of this judgment mainly upon the proposition that the agreement between Hauck and Mrs. Ross was purely personal to them, and that Conduitt, by using the wall erected in pursuance thereof, came under no obligation whatever in consequence of such use. They insist further, that if liable at all, the extent of his liability was the actual value of the wall when used, and not its original cost.

The rights and obligations of the parties must be determined by a construction of the agreement already referred to, which is of the following tenor:—

“This agreement between John Hauck of the first part, and Julia A. Ross and Norman M. Ross, her husband, of the second part, witnesseth: That in consideration that the parties of the second part shall erect a substantial brick wall, twelve inches in thickness and four stories high, on the line dividing the property of John Hauck and Julia A. Ross, in square 87, in the city of Indianapolis, Marion county, Indiana, which line is 12 feet south of the south line of lot

with the land, but because he is the vendor of so much of the wall.” *Gibson v. Holden*, 115 Ill. 199, 206 (1885).

Irving v. Turnbull, [1900] 2 Q. B. 129, seems to be the only English case on this subject.

No. 4, in Morris Morris' subdivision of square 87, in the city of Indianapolis, and which wall is to stand six inches in width upon the ground of said Hauck, and six inches upon the ground of said Ross, and is to run back the depth of said Ross's present building, and may at any time be extended further back on the same line the full depth of said lots by either party, the full consent of said Hauck to the erection of said walls being hereby granted: Now therefore, said John Hauck hereby binds himself, his heirs, executors, administrators and assigns, that whenever, after the erection of said wall or walls by the party of the second part, said Hauck, his heirs, executors, administrators or assigns, shall, in any building he or they may erect on the present ground of said Hauck, use said wall or any part thereof, or attach any part of his or their building thereto, then the said Julia A. Ross shall be paid, without relief from valuation or appraisement laws, the full value of one half the original cost of said wall or walls. And it is further agreed that neither party shall have the right to so use any part of said wall or walls as to weaken or endanger the same; and that said Hauck, his heirs, executors, administrators or assigns shall not in any wise whatever use or attach to said wall or walls so to be erected by said Ross, until the said value and cost of one half thereof shall be ascertained, and paid or tendered to said Julia A. Ross.

"In witness whereof, we have hereunto set our hands and seals, this 26th day of April, 1875.

(Signed)

JOHN HAUCK.	[SEAL]
JULIA A. ROSS.	[SEAL]
N. M. ROSS.	[SEAL]"

This agreement was duly acknowledged and recorded in the miscellaneous records of Marion county, and it is averred that the appellant had actual notice of it at the time he purchased.

The liability of the appellant depends upon whether the contract set out constituted a continuing covenant, which became annexed to and ran with the Hauck lot. If it did, he is liable according to its terms; if it did not, he is liable in this form of action for nothing.

In considering whether a covenant is one which does, or does not, run with the land, there are always embraced the following inquiries: 1. Is the covenant one which, under any circumstances, may run with land? 2. Was it the intention of the parties, as expressed in the agreement, that it should so run?

Doubtless, a covenant which, from its character, might run with the land, may be so restricted in terms as to make it purely personal, and available to the parties to it, and no other. So, too, a covenant may contain apt words to make it a continuing covenant; yet if its nature or the subject-matter of it is such that it does not concern some interest or estate in land, either existing or created by it, it cannot run with land.

When an instrument conveys or grants an interest or right in land, and at the same time contains a covenant in which a right attached to the estate or interest granted is reserved, or when the grantee covenants that he will do some act on the estate, or interest granted, which will be beneficial to the grantor, either as respects his remaining interest in the lands out of which an interest is granted, or lands adjacent thereto, such covenant is one which may become annexed to and run with the land, and bind its owners successively. When such grant is made, and contains a covenant so expressed as to show that it was reasonably the intent that it should be continuing, it will be construed as a covenant running with the land. A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.

In *Bally v. Wells*, 3 Wils. 25, it was said: "When the thing to be done, or omitted to be done, concerns the lands or estate, *that* is the *medium* which creates the privity between the plaintiff and defendant."

By the contract under consideration, Mrs. Ross acquired the right to enter upon the Hauck lot and erect and permanently maintain thereon a party wall. This was a grant to her of an interest in land, and was of such a character that a perpetual covenant might be annexed to it. *Snowden v. Wilas*, 19 Ind. 10; *Hazlett v. Sinclair*, 76 Ind. 488 (40 Am. R. 254); 1 Smith Leading Cases, 8th ed., 161, 162.

In consideration of this grant to her she covenanted to do an act beneficial to the remaining interest of Hauck; that act was the erection of a wall so situated as that one half of it should rest on the margin of his lot, and the other half on hers, thus devoting each estate to the mutual support of the party wall. She at the same time covenanted that when she should be reimbursed one half the cost of the wall, he, or his grantees, should acquire a reciprocal interest in her lot, and in legal effect become owner of one half the party wall.

This agreement created what has been aptly termed mutual or cross easements in favor of each in the lot of the other, and was an arrangement mutually beneficial to both properties. *Fitch v. Johnson*, 104 Ill. 111; *Rocha v. Ullman*, 104 Ill. 11; *Bronson v. Coffin*, 108 Mass. 175 (11 Am. R. 335); *Thomson v. Curtis*, 28 Iowa, 229.

It contained, therefore, all the elements necessary to a covenant capable of running with the land. *Hazlett v. Sinclair*, *supra*; *Richardson v. Tobey*, 121 Mass. 457 (23 Am. R. 283); *Standish v. Lavrence*, 111 Mass. 111; *Maine v. Cumston*, 98 Mass. 317; *Savage v. Mason*, 3 Cush. 500; *Brown v. McKee*, 57 N. Y. 684; *Keteltas v. Penfold*, 4 E. D. Smith, 122; *Platt v. Eggleston*, 20 Ohio St. 414; *Masury v. Southworth*, 9 Ohio St. 340; *Bertram v. Curtis*, 31 Iowa, 46; *Norfleet v. Cromwell*, 70 N. C. 634, 641 (16 Am. R. 787).

It is apparent, too, that it was the intention of the parties that the covenant to pay should run with the land. The words used in that

connection are those usually and aptly employed for the purpose: "John Hauck hereby binds himself, his heirs, executors, administrators and assigns, that whenever, after the erection of said wall or walls by the party of the second part, said Hauck, his heirs, executors, administrators, or assigns, shall, in any building he or they may erect," &c., they will pay, &c. A continuing covenant may exist without the word "assigns," or "grantees," but when these or equivalent words are used, they become persuasive of the intent of the parties. *Van Rensselaer v. Hays*, 19 N. Y. 68. It was the manifest purpose of the parties that the right to receive payment for the wall should be personal to Mrs. Ross. It was stipulated that payment should be made to Julia A. Ross.

It results that the complaint was sufficient, and that the second paragraph of answer, in which it was alleged that the wall, by reason of injuries sustained from fire, was worth much less than the original cost, was insufficient, and the respective rulings of the court were not erroneous.

The covenant being one which ran with the land, when the appellant availed himself of its benefits he became related to it as the original covenantor, and it became the measure of his obligation. We think it is fairly deducible from the complaint that the appellant derived his title through Hauck.

*Judgment affirmed, with costs.*¹

SEBALD v. MULHOLLAND.

COURT OF APPEALS OF NEW YORK. 1898.

[Reported 155 N. Y. 455.]

APPEAL from so much of a judgment of the General Term of the late Superior Court of the city of New York, entered January 10, 1895, as affirmed a judgment entered upon a decision of the court on trial at Special Term dismissing plaintiff's complaint on the merits.

On November 17, 1871, Robert Auld was the owner of an unimproved lot on West Forty-sixth street in the city of New York, known as lot No. 417. At the same time Philip C. Agnew was the owner of an adjacent lot, known as lot No. 415, which was also unimproved. Auld contemplated building upon his lot two feet back from the street line, and on that day entered into a written agreement with Agnew, which was recorded December 8, 1871, which, so far as material, was as follows:

¹ A petition for a rehearing was overruled. The opinion of the court refusing this petition is omitted.

See *Richardson v. Tobey*, 121 Mass. 457; *Rochs v. Ullman*, 104 Ill. 11; *Adams v. Noble*, 120 Mich. 545.

"This agreement, made and entered into on the 17th day of November, 1871, between Robert Auld, of the city of New York, of the first part, and Philip Agnew, also of said city, of the second part, witnesses, that,

"WHEREAS, the said parties are each the owners of a lot of land situated on the northerly side of Forty-sixth street, between the Ninth and Tenth avenues, in the city of New York, and which said lots lie adjacent to each other, . . .

"And WHEREAS, the said Robert Auld is about to erect a building upon his lot of land, and it has been agreed between said parties that the wall of said building shall be a party wall, and be constructed for one-half its thickness on the land of each party on each side of the said dividing line;

"Now, therefore, the said parties, in consideration of the premises and one dollar paid by the said Auld to the said Agnew, the receipt whereof is hereby acknowledged, have agreed, and do hereby mutually covenant and agree, each with the other, and for their respective heirs, administrators and assigns, that the said wall, so to be constructed, shall be used and maintained as a party wall forever; that the said Auld and his . . . shall be permitted freely and without . . . or hindrance to enter upon the lot of said Agnew to excavate for the said wall and for the construction of the same (here follows a description of the wall); said wall not to extend nearer the street than the front wall of the front building on the easterly side of said lots, from which point it may be extended back to a distance not exceeding 55 feet.

"And it is further agreed between the said parties that whenever the said Agnew or his personal representatives may desire to use said wall, he, or they, shall pay such proportion of the value of said wall as the portion thereof which he shall use shall bear to the whole of said wall, such value to be ascertained, in the event of a disagreement between the parties themselves as to the same, by arbitration; . . . and, further, that if it shall become necessary to repair or rebuild the whole or any portion of said wall, such repairing or rebuilding shall be borne equally between the said parties, or their representatives, as to such portions of the said wall as shall be used in common between them, and as to the remaining portions such repairing or rebuilding shall be wholly at the expense of the party who shall exclusively use the same, and whenever the said wall shall be rebuilt it shall stand upon the same spot and be of the same or similar materials and of the same size as the present wall unless the laws shall permit or require a wall of different dimensions.

"And it is further mutually understood and agreed between the aforesaid parties that this agreement shall be perpetual, and at all times be construed as a covenant running with the land, and that no part of the fee of the soil upon which the said party wall shall stand shall pass to or be vested in either party in or by these presents."

Subsequently, by various *mesne* conveyances, Auld's title to No. 417 became vested in the plaintiff, and Agnew's title to No. 415 was ac-

quired by the defendant subject to such agreement. In 1872 Auld, while the owner of lot No. 417, erected a building thereon, the easterly wall of which was constructed as a party wall under such agreement, and now forms the easterly wall of the plaintiff's premises. In 1892 the defendant built upon lot No. 415 and used a portion of the party wall, which was agreed upon this trial to be of the value of \$567.50, without paying or offering to pay the plaintiff one-half of the value of the portion so used. The defendant also extended his house to the street line of his own land, in consequence of which the front projects two feet beyond the front of the houses upon Nos. 417 and 418. On the seventh of January, 1893, the plaintiff offered to arbitrate with the defendant the question of the cost or value of the portion of the party wall used by him, but the defendant did not join in any appraisal, and refused to pay the value of the portion of the wall used.

This action was brought in the Superior Court of the city and county of New York, and was in the nature of a suit in equity. The first cause of action was to charge upon the land of the defendant a lien for the amount due by reason of his having used the party wall, and the second was to compel the removal of two feet of the front of the defendant's house, which extends to the front line, or that the plaintiff be awarded damages in lieu thereof.

The trial court held that the plaintiff was not entitled to any compensation from the defendant for the use of the party wall; that the defendant was not prevented by the agreement between the parties from building to the street line, and that the plaintiff's complaint should be dismissed.

The defendant set up as a counterclaim that the plaintiff had erected and maintained a newel post connected with the stoop to her house, which post and a portion of the railing were upon the land of the defendant and constituted an obstruction to the entrance and egress therefrom, and demanded as relief that the defendant have judgment against the plaintiff directing her to take down and remove such newel post.

The trial court found that the post and railing of the plaintiff's stoop did not interfere in any substantial manner with the defendant's enjoyment of his premises; that they had not caused the defendant any damage, and held that he was not entitled to any equitable relief upon his counterclaim. It thereupon dismissed the plaintiff's complaint as to both causes of action, and also dismissed the defendant's counterclaim.

The plaintiff excepted to the conclusions of law as to the causes of action set up in her complaint, while the defendant excepted to the decision of the court in regard to his counterclaim. From the judgment entered upon the decision of the Special Term the plaintiff appealed to the General Term of the Superior Court. Her appeal was from so much of the judgment as dismissed her complaint. The defendant appealed from so much of the judgment as dismissed his counterclaim. The General Term affirmed the judgment of the trial court, and the plaintiff appeals to this court from so much of the judgment of the

General Term as affirmed the judgment of the Special Term adjudging that the plaintiff's complaint should be dismissed, but the defendant has not appealed.

John Frankenhimer for appellant.

Edward W. Sheldon for respondent.

MARTIN, J. So far as the appeal in this case involves the dismissal of the plaintiff's second cause of action, it is obvious that the decision of the Special Term was correct and the General Term properly affirmed it. Indeed, the propriety of the decision, so far as it relates to that question, is so manifest that we deem any discussion of it wholly unnecessary.

The only remaining question arises under the contention of the appellant that the agreement by Agnew to pay a portion of the value of the party wall whenever it should be used by him or his personal representatives, was a covenant running with the land. The effect of such an agreement has several times been passed upon by this court, and unless the rule which formerly existed in this state has been changed, the appellant's contention cannot be sustained. Indeed, her counsel frankly admits that the cases of *Cole v. Hughes* (54 N. Y. 444), *Scott v. McMillan* (76 N. Y. 141, 144), and *Hart v. Lyon* (90 N. Y. 663) establish a principle adverse to her claim which, if followed, must result in the defeat of this appeal.

In the *Cole* case it was held that where an owner of land builds a party wall under an agreement with an adjoining owner that, when the latter shall use it, he will pay the expense of his portion of the wall, the right to compensation is personal to the builder, and does not pass by a grant of his land. It was also held that the agreement did not run with the land of the adjoining owner so as to bind his subsequent grantees, although the adjoining owner, by the terms of his agreement assumed to bind them, and although they purchased with notice of the agreement.

In *Scott v. McMillan* this court decided that a covenant to contribute to the construction of a party wall, when he should use it, entered into by an owner of land, for himself, his heirs and assigns, did not run with the land, and was not enforceable against a subsequent grantee, although his deed was by its terms subject to the covenant.

In *Hart v. Lyon* the agreement, in all essential particulars, was identical with the agreement in the case at bar. There, as here, it was provided that it should be perpetual, and should at all times be construed as a covenant running with the land. That case cannot be fairly distinguished from this. There, an owner of land built a party wall under an agreement between himself and an adjoining owner, that when the latter should use it he would pay one-half of the value of the wall, and it was held that the right to compensation was personal to the former, and did not pass by a conveyance of his land, although the agreement contained a provision that it should be construed as a covenant running with it. That provision was held to apply only to the cove-

nants to repair and rebuild, and not to the agreement to pay when the wall was used. It was said that the payment of one-half of the value of the wall, when the lot was built upon, would become inoperative when the payment was made, and it could not be perpetual because it spent its force by being fully executed, and that it could not run with the land after being fully performed. No reason is apparent why the same construction should not be given to a like provision in the agreement under consideration.

The principle of those cases is decisive of this question, and leads irresistibly to the conclusion that the judgment must be affirmed, unless the doctrine established by them has been subsequently overruled. The contention of the appellant is that those cases have been overruled by this court. Upon the validity of that contention this appeal must stand or fall.

The appellant relies upon the case of *Mott v. Oppenheimer* (185 N. Y. 312) to sustain her claim. An examination of the record in that case discloses that two persons each owned two lots on Fifty-ninth street, in the city of New York. The lots were numbered 1, 3, 5 and 7. One of the parties owned lots numbered 1 and 7, and the other owned lots 3 and 5. While these lots were unoccupied and wholly unimproved, an agreement was entered into between the parties, which recited that they were desirous of entering into an agreement authorizing either of them, and his respective heirs and assigns, to erect a party wall upon the lines of one or both of the lots adjoining the lots of the other. It then provided that either of the parties might, at any time thereafter, erect upon his lot or lots and the adjoining lot or lots of the other party, party walls, the centre line to coincide with the dividing line of the lots upon which they might be erected, and the other party, his heirs and assigns, should have the right to use them by paying to the party who might have erected the walls, his heirs or assigns, one-half their value, when they were used. It also provided that when built they should forever remain party walls, and that the agreement and the covenants therein should apply to and bind the legal representatives of the several parties and should be construed as covenants running with the land. In that case there was no agreement that one should build a party wall, and the other pay when it should be used by him. But the agreement was a general one by which the parties conferred, each upon the other, the authority to erect such wall, and dedicated to that use a portion of each of their lots, with an agreement that if either should build the other might have the right to use it by paying his share of the expense. Thus, it is clear that in that agreement there was no personal covenant by one to pay the other. It was not and could not then be known who would build, or who was to pay when the wall was used. The agreement was wholly prospective, and its purpose was to impose upon the land of each, and not upon either personally, the burden of a future party wall, and to secure to the land and, thus, to its subsequent owners, a corresponding right to the use of the wall by paying one-

half of its value. The land and the manner of its prospective use were the primary and only subject and purpose of the agreement. The plain intent of the parties was to bind the land by covenants that should run with it, and that no personal liability should arise. The evident intention of the parties was to charge upon the land the burden and expense of party walls, and at the same time to confer upon the owner of each of the lots the right to construct them, on condition that any present or future owner of the adjoining lands using them should pay the value of the portion so used. The provisions of the agreement in that case related to the future use of the property, and there was no intention to provide for any present or existing situation. Obviously, the agreement was made with the view that such a contract would be beneficial to the land of both parties and would bind it when the conditions contemplated should subsequently arise. In that case the character of the agreement, its obvious purpose, its prospective provisions, and the situation of the lands when the agreement was made, all concurred in showing an intent that its covenants should run with the land, and clearly justified the court in so holding. But in the other cases to which we have adverted, as well as in the case at bar, the agreement was in effect a personal covenant between the parties. By the contracts in those cases a designated party was authorized to build a party wall, the other agreeing to pay a portion of its value when it should be used by him. There the agreement was a present one, the party who was to build and the one who was to pay were expressly designated, and the covenant to pay was clearly a personal one. Hence, it is plain that the *Mott* case is distinguishable from the cases of *Cole v. Hughes*, *Scott v. McMillan* and *Hart v. Lyon*, and is not in conflict with the doctrine which has long been established in this state.

Moreover, it is obvious that, when it decided the *Mott* case, this court did not intend to overrule or in any way interfere with the doctrine of the previous cases, as the learned judge who delivered the opinion of the court in that case expressly stated: "If this agreement was the ordinary one between adjoining owners for the erection and use of a party wall on their lands, such as it was in the cases of *Cole v. Hughes* (54 N. Y. 444) and *Scott v. McMillan* (76 id. 144), I think we should have to agree with the appellants' argument. . . . We do not interfere, in the least degree, with the well-settled doctrine of these cases, if we give to the present contract a construction which imposed the burden of its covenants upon the land it concerned." He also distinguished that case from the case of *Hart v. Lyon*. So that from a mere reading of that opinion it becomes plain that the court did not intend to "interfere, in the least degree," with the principle established by the *Cole* and *Scott* cases, nor with the doctrine of the case of *Hart v. Lyon*.

Thus, it is obvious that the appellant's contention that the agreement between the parties in the case at bar constituted a covenant running with the land cannot be sustained; that the judgments of the courts below were right, and that they should be affirmed.

All concur (GRAY, J., upon ground stated in memorandum following), except O'BRIEN and BARTLETT, JJ., not voting.

Judgments affirmed.

GRAY, J. I concur with my brother MARTIN in his opinion, because the contract in this case requires a different construction from that placed upon the contract in the case of *Mott v. Oppenheimer*. In that case the question was, upon the contract, whether any interest in the land was raised by force of its covenants and we thought that that was the effect of the instrument.

It is quite possible for parties so to contract with reference to a party wall upon their premises as thereby to dedicate the land to such a purpose. Whether they have done so is a question to be determined upon a construction of their expressed intentions, in connection with the covenants of the instrument.

LINCOLN v. BURRAGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901.

[Reported 177 Mass. 378.]

APPEAL from a decree of the Superior Court sustaining the defendant's demurrer to the declaration. Writ dated July 6, 1899.

The declaration alleged that the plaintiffs, as executors of the will of Frank N. Thayer, deceased, by virtue of the powers conferred upon them under said will, conveyed to Franklin T. Rose by deed dated November 9, 1883, a certain parcel of land in Boston on the corner of Commonwealth Avenue and Hereford Street, bounded westerly on land conveyed by said executors to Richard C. Flower, through the middle of the brick party wall; "that in said deed it was provided as follows: 'Said grantee, by accepting this deed, agrees for himself, and his heirs, and assigns, to pay to said executors, or their successors in said trust from time to time, the value at the time of use of so much of said party wall standing on the described premises, including the piling and foundations under the same, as he or they may at any time use.'

"At the time of said conveyance there stood upon the premises described in said deed, one half of a party wall constructed by the said Thayer at his own expense, but said premises were not otherwise built upon, and so remained until the same were purchased by the defendant.

"Thereafter, on or about January 17, 1899, the defendant purchased the said lot of land, and also the adjoining lot conveyed by said executors to said Flower, as aforesaid, and the same were conveyed to her, subject to the agreement above recited.

"The defendant then proceeded to tear down the dwelling house erected on the said adjoining lot, and to construct a building covering both of the said lots, and to erect a wall upon the said foundations, and in place of the said party wall.

"That the defendant was bound by the terms of said agreement, and having torn down the said party wall for the purpose of erecting a building on said premises, and having used the piling and foundations under the same, for the purpose of erecting another wall thereon, became liable to the plaintiffs for the value of the whole [one half] of said party wall, piling and foundations, which, at the time of use thereof, were of the value of \$1,500."

The defendant demurred to the declaration.

The case was heard in the Superior Court by *Bell, J.*, who sustained the demurrer and ordered judgment for the defendant; and the plaintiffs appealed to this court.

W. D. Turner, for the plaintiffs.

B. G. Davis, for the defendant.

HOLMES, C. J. The acceptance by Rose of the conveyance to him implied a promise by him to pay for the party wall at the time of use. Although not a covenant, under our decisions such a promise might be held, in equity if not at law, to follow the analogy of covenants running with the land in a case to which that analogy would apply. *Whittenton Manuf. Co. v. Staples*, 164 Mass. 319. But it is most unusual to see a covenant under which the rights are held in gross and the burdens go with the land. We suspect that it would be hard to find in the books another case like *Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267, 272. Compare further *Walsh v. Packard*, 165 Mass. 189, 192. Leaving cases of landlord and tenant on one side, commonly, where the burden of a covenant goes with the land, the covenant either creates a servitude or a restriction in the nature of a servitude in favor of a neighboring parcel, or else is in some way incident to and inseparable from such a servitude; or, if attached to the dominant estate, appears to be the *quid pro quo* for the easement enjoyed. *Savage v. Mason*, 8 Cush. 500; *Richardson v. Tobey*, 121 Mass. 457; *Norcross v. James*, 140 Mass. 188, 191; *King v. Wight*, 155 Mass. 444; *Whittenton Manuf. Co. v. Staples*, 164 Mass. 319.

In the present case Rose's assumpsit did not purport to be for the benefit of the owner for the time being of the adjoining land. The deed which he accepted showed that his grantors had conveyed that land so that they could not annex a promise to it, and disclosed no interest on their part to secure compensation for use of the party wall to their grantee. On the contrary, the stipulation is in favor of the executors making the conveyance, "or their successors in said trust from time to time," showing in the clearest way that the benefit of the promise was intended to be personal, and a postponed compensation to the estate for the use of a wall which the testator had built. This is the construction upon which this action is brought. But if the

promise is personal on the side of the benefit, no reason whatever is shown for departing from the tradition of the law in order to make it follow the land with its burden, as we have already said. Indeed, the words of Rose's promise are satisfied if they be read as a personal promise to pay whenever he or his assigns may use the wall. Furthermore, it never is to be forgotten that under all circumstances it is an anomaly requiring explanation when an active duty is other than personal and is attached to land. See *Norcross v. James*, 140 Mass. 188, 189, 190; *Cole v. Hughes*, 54 N. Y. 444. This difficulty is felt so strongly in England that when a duty to pay for a party wall is recognized between owners who have not contracted together personally, it seems likely that it will be worked out in terms of implied contract, as it was in *Irving v. Turnbull* [1900], 2 Q. B. 129. See also *Maine v. Cumston*, 98 Mass. 317, 320; *Standish v. Lawrence*, 111 Mass. 111, 114; *Richardson v. Tobey*, 121 Mass. 457, 459, 460.

The plaintiffs put their argument in the form last suggested. But we do not see any reason why a change in the fiction should enlarge their rights. In fact, the defendant did not contract with the plaintiffs. Any ground upon which she should be held liable in contract would be a fiction. In the present case, where the plaintiffs have no interest in the property used by the defendant, it is no better to say that a contract is implied than to say that it runs with the land. If a covenant by Rose in the form of the stipulation set forth would not have bound his assigns, even under our law which permits the burden of such covenants to be transferred, and if therefore there was no obligation on the defendant arising from Rose's simple contract on the analogy to such a covenant, we conceive that we should be unwarranted in saying that a contract by the defendant was to be implied simply from the fact of that same contract by Rose and the defendant's succession to his title.

It is not quite clear that there are any further facts which might strengthen the plaintiffs' case on this latter ground of implied contract. It is not quite clear that the defendant actually contracted even with her grantor. It does not appear that her grantor was Rose. If both these facts be assumed to have been in the form most favorable for the plaintiffs, while it may be that slight circumstances would be laid hold of to avoid circuitry and to establish a privity of contract between the parties to this suit, still it would be difficult to imply a contract in favor of the plaintiffs simply on the ground that a contract was made with somebody else. In the cases which have gone farthest the first step has been that both lots have been conveyed under an arrangement which contemplated reciprocal benefits and burdens between the two. *Maine v. Cumston* and *Irving v. Turnbull*, *ubi supra*.

Perhaps a word should be said of a case properly enough not cited at the argument, *Paper Stock Disinfecting Co. v. Boston Disinfecting Co.*, 147 Mass. 318, where a promise was implied on the part of the assignee of a license under a patent granted by deed poll containing a

stipulation for payment. In that case the license was revocable on failure to pay as agreed, and as a license in its nature is not an estate but a personal permission, it was quite reasonable to say that the defendant really accepted it from the plaintiff, although through a third person, and by doing so impliedly but actually agreed to pay for it according to its terms.

*Judgment affirmed.*¹

SECTION II.

IN EQUITY.

HOLMES v. BUCKLEY.

CHANCERY. 1692.

[*Reported Prec. in Ch. 39.*]

ANTHONY BOTTELY and Katharine, his wife, being seised in right of the said Katharine, of two pieces of ground by indenture, 25 Jan. 1622, did grant a watercourse to one John Howland, and his heirs, through the said two pieces of ground; and by that deed did covenant for them, their heirs and assigns, from time to time, to cleanse the same; and that all fines and recoveries levied and suffered, and to be levied and suffered of the said grounds, should be and inure for the strengthening and confirming the said watercourse, according to the said grant, and afterwards, the 30th of the same month, join in a deed, declaring the uses of the recovery to be suffered of the said ground; and that the same should inure to the strengthening and confirming the watercourse granted by the said indenture of the 25th of January.

The watercourse, by mesne assignments, came to the plaintiff; and the said two pieces of ground to the defendant, who built upon the same, and much heightened the ground that lay over the watercourse, and made it much more inconvenient and chargeable to repair, and as it was alleged (and in part proved) the building had much obstructed the said watercourse; so the bill was, to be established in the enjoyment of the said watercourse; and that the defendants, and all claiming under them, might from time to time cleanse the same, according to the said covenants.

It was objected for the defendants, that the said covenant being a personal covenant, and made by a feme covert, could in no sort bind the defendants; and that, though the recovery had made good the grant of the watercourse, yet that this personal covenant was not at all strengthened or bettered by it; and that the plaintiff, and those under whom he claimed, being sensible of it, had for forty years cleansed the same at their own charges.

¹ And see *Kimm v. Griffin*, 67 Minn. 26.

But the court was of opinion, that this was a covenant that ran with the land, and though made by a feme covert, was strengthened and made good by the recovery, and said, though the plaintiff had cleansed the same at his own charge, whilst it was easy to be done, and of little charge; yet since the right was plain upon the deed, and the cleansing made chargeable by the building, it was reasonable the defendants should do it, and decreed accordingly and gave the plaintiff his costs.

TULK v. MOXHAY.

CHANCERY. 1848.

[*Reported 2 Phil. 774.*]

In the year 1808 the plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the Square, sold the piece of ground by the description of "Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same," to one Elms in fee: and the deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors, and administrators, "that Elms, his heirs, and assigns should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure Ground."

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor: but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed this bill for an injunction; and an injunction was granted by the Master of the Rolls to restrain the defendant from converting or using the piece of ground and Square Garden, and the iron railing round the same, to or for any other purpose than as a Square Garden and Pleasure Ground in an open state, and uncovered with buildings.

On a motion, now made, to discharge that order,

Mr. R. Palmer was heard for the defendant.

The LORD CHANCELLOR [COTTENHAM] (without calling upon the other side).

That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract: the owner of certain houses in the Square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. There are not only cases before the Vice-Chancellor of England, in which he considered that doctrine as not in dispute; but looking at the ground on which Lord Eldon disposed of the case of the *Duke of Bedford v. The Trustees of the British Museum*, 2 My. & K. 552, it is impossible to suppose that he entertained any doubt of it. In the case of *Mann v. Stephens* [15 Sim. 377], before me, I never intended to make the injunction depend upon the result of the action: nor does the order imply it. The motion was, to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also to dissolve the injunction. I upheld the injunction, but discharged the order of commitment, on the ground that it was not clearly proved that any breach had been committed; but there being a doubt whether part of the premises on which the defendant was proceeding to build, was locally situated within what was called the *Dell*, on which alone he had under the covenant a right to build at all, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to prejudice the plaintiff in his right to bring an action if he thought he had such right, and therefore I gave him liberty to do so.

With respect to the observations of Lord Brougham in *Keppell v. Bailey* [2 M. & K. 517], he never could have meant to lay down that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.

I think the cases cited before the Vice-Chancellor and this decision of the Master of the Rolls perfectly right, and therefore that this [motion to discharge the] injunction-must be refused, with costs.¹

RENALS v. COWLISHAW.

CHANCERY DIVISION AND COURT OF APPEALS. 1878, 1879.

[Reported 9 Ch. Div. 125; 11 Ch. Div. 866.]

By an indenture dated the 29th of September, 1845, Messrs. Hoby, Winterbotham, and Russell, as the devisees in trust for sale of a man-

¹ "In my opinion, there can be no difference between law and equity in construing such covenants with a view to seeing whether they do or do not run with the land. The same words in the same document must necessarily bear the same meaning in all the courts." FARWELL, J., in *Rogers v. Hosegood*, [1900] 2 Ch. 388, 397.

"In whatever form such a restraint is placed on real estate by the terms of a grant, whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both in law and equity. . . .

"The more difficult question, and the one on which the decision of this case must turn, is, to what extent and in what cases are such stipulations binding on those who take the estate under the grantee, directly or by a derivative title? Upon this point, the better opinion would seem to be that such agreements are valid, and capable of being enforced in equity against all those who take the estate with notice of them, although they may not be strictly speaking real covenants, so as to run with the land, or of a nature to create a technical qualification of the title conveyed by the deed. This opinion rests on the principle that, as in equity that which is agreed to be done shall be considered as performed, a purchaser of land, with notice of a right or interest in it, subsisting in another, is liable to the same extent and in the same manner as the person from whom he made the purchase, and is bound to do that which his vendor had agreed to perform. Therefore an agreement or covenant, though merely personal in its nature, and not purporting to bind assignees, will nevertheless be enforced against them, unless they have a higher and better equity as *bona fide* purchasers without notice. . . . In this view, the precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." BIGELOW, J., in *Whitney v. Union Ry. Co.*, 11 Gray, 359, 363, 364 (1860). Cf. *Lewis v. Gollner*, 129 N. Y. 227.

sion-house and residential property known as the Mill Hill estate, and of certain pieces of land adjoining thereto, sold and conveyed two of these adjoining pieces of land to one Francis Shaw in fee, and Shaw thereby, for himself, his heirs, executors, and administrators, covenanted with Hoby, Winterbotham, and Russell, their heirs, executors, administrators, and assigns, not to build upon the lands thereby conveyed within a certain distance from a particular road leading "to the Mill Hill House and property belonging to the said trustees;" that the garden walls or palisades to be set up along the side of the said road should stand back a certain distance from the centre of the road; that any house to be built on the land adjoining the road should be of a certain value, and of an elevation at least equal to that of the houses on a particular road; and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling-houses only. The conveyance did not state that this covenant was for the protection of the residential property, or in reference to the other adjoining pieces of land, or make any statement or reference thereto.

The same trustees also sold about this time other pieces of lands adjoining the Mill Hill estate; and the conveyance to the purchaser in each case contained restrictive covenants similar to those above mentioned. It was alleged by the plaintiffs in their statement of claim that the intention of all the restrictive covenants was to protect and maintain the value of the Mill Hill estate, and to secure the continuance of the surrounding neighborhood as purely residential in character.

The trustees, in December, 1854, sold and conveyed the Mill Hill estate to T. P. Bainbrigge, in fee, and Bainbrigge having died, his devisees in trust, in September, 1870, sold and conveyed the same estate to the plaintiffs as tenants in common in fee.

In neither of these two conveyances were there covenants similar to those in the conveyance to Shaw, but there was in the conveyance to the plaintiffs a covenant by them with their vendors not to build a public-house or carry on offensive trades upon a particular portion of the property conveyed to them. Neither of the two conveyances recited or mentioned in any way the conveyance or sale to Shaw, or the existence of any restrictive covenant entered into by Shaw or by Gadsby, nor did either of them recite or mention the sales or conveyances of the other pieces of land sold as above mentioned.

There had also been a devolution title with regard to the lands sold to Shaw, for after his death Mary Shaw, the person entitled under his will, in August, 1867, sold and conveyed part of the lands comprised in the indenture of September, 1845, to John Gadsby in fee, who, in his conveyance, entered into covenants with Mary Shaw, her heirs, executors, and administrators, substantially identical *mutatis mutandis*, with the restrictive covenants contained in the indenture of the 29th of September, 1845. And subsequently the lands so conveyed to Gadsby were sold and conveyed (with certain buildings erected thereon) by

Gadsby, or persons deriving title through him, to the defendants as tenants in common in fee.

The plaintiffs alleged that the defendants were carrying on upon their lands, and in contravention of the restrictive covenants first above mentioned, the trade of wheelwrights, smiths, and bent timber manufacturers, and had erected a high chimney which emitted thick black smoke, and that those acts were destructive of the residential character of the neighborhood, and had deteriorated the value and amenity of the Mill Hill estate. By their action they claimed an injunction to restrain the defendants from carrying on any trade or business upon their lands, and from permitting the buildings erected thereon to be used otherwise than as private houses, and from contravening in any manner the restrictive covenants contained in the indenture of September, 1845.

The principal question argued, and that on which the decision turned, was as to the right of the plaintiffs to sue upon these covenants.

It appeared that no contract had been entered into or representations made, either upon the occasion of the purchase by Bainbrigge from the trustees, or upon the purchase from Bainbrigge by the plaintiffs, that the purchaser should have the benefit of the covenants entered into by Shaw with the trustees.

Dickinson, Q. C., and Renshaw, for the plaintiffs.

W. Pearson, Q. C., and Bury, for the defendants, were not called upon.

HALL, V. C. I think this case is governed by *Keates v. Lyon*, by *Child v. Douglas*, Kay, 560; 5 D. M. & G. 739, as ultimately decided by Vice-Chancellor Wood, 2 Jur. (N. S.) 950, who, after granting an interlocutory injunction in the first instance, refused to grant the plaintiff an injunction at the hearing, and by the case of *Master v. Hansard*, 4 Ch. Div. 718.

The law as to the burden of and the persons entitled to the benefit of covenants in conveyances in fee, was certainly not in a satisfactory state; but it is now well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, having notice thereof. Who, then (other than the original covenantee), is entitled to the benefit of the covenant? From the cases of *Mann v. Stephens*, 15 Sim. 377; *Western v. Macdermott*, Law Rep. 2 Ch. 72; and *Coles v. Sims*, Kay, 56; 5 D. M. & G. 1, it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, inures to the assign of the first purchaser, in other words, runs with the land of such purchaser.

This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant: whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important.

The plaintiffs in this case, in their statement of claim, rest their case upon their being "assigns" of the Mill Hill estate, and they say that as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill estate, which they retained; and therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length, viz., that in such a case a purchaser becomes entitled to the covenant even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by the vendor upon the occasion of the conveyance containing the covenants. It appears to me that the three cases to which I have referred show that this is not the law of this court; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not showing that the benefit of the covenant was intended to inure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase. Lord Justice Bram-

well, in *Master v. Hansard*, 4 Ch. Div. 724, said: "I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors, to enable them to make the most of the property which they retained." In the present case I think that the covenants were put in with a like object. If it had appeared in the conveyance to Bainbrigge that there were such restrictive covenants in conveyances already executed, and expressly or otherwise that Bainbrigge was to have the benefit of them, he and the plaintiffs, as claiming through him, would have been entitled to the benefit of them. But there being in the conveyance to Bainbrigge no reference to the existence of such covenants by recital of the conveyances containing them or otherwise, the plaintiffs cannot be treated as entitled to the benefit of them. This action must be dismissed, with costs.

The plaintiffs appealed.

Hastings, Q. C., and *Renshaw*, for the plaintiffs.

W. Pearson, Q. C., and *Bury*, for the defendants, were not called upon.

JAMES, L. J. I am of opinion that the decision of Vice-Chancellor Hall is correct. It is impossible, as it seems to me, to distinguish this case from the cases to which he has referred. To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into. Supposing I were now framing the deed afresh, I should not have the remotest idea how the covenant ought to be framed, as I cannot tell what the property was which the parties intended to be protected, and within what limits.

I do not think it necessary to add anything more, except that I entirely concur with every word of the judgment of Vice-Chancellor Hall.

BAGGALLAY, L. J. I am of the same opinion with the Lord Justice, and I adopt entirely the language of the Vice-Chancellor in his judgment, as reported 9 Ch. Div. 125.

THESIGER, L. J. I am of the same opinion.¹

¹ "The law on the subject has never been stated more clearly than it was by Vice-Chancellor Hall in *Renals v. Cowlshaw*. . . I should be disposed to hesitate if I were invited to extend the principles recognized in *Renals v. Cowlshaw*. But those principles, as defined by the Vice-Chancellor, are, I think, perfectly sound, consistent with the authorities, and consistent with good sense." LORD MACNAGHTEN, in *Spicer v. Martin*, 14 App. Cas. 12, 23, 24 (1888).

"When, as in *Renals v. Cowlshaw*, there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land, and this can hardly be the case when the purchaser did not know of the existence of the restrictive covenant. But when, as here, it has been once annexed to the land reserved, then it is not necessary to spell an intention out of the surrounding facts, such as the existence of a building scheme, statements at auction, and such like circumstances, and the presumption must be that it passes on

HAYWOOD v. BRUNSWICK BUILDING SOCIETY.

COURT OF APPEAL. 1881.

[Reported 8 Q. B. Div. 408.]

APPEAL from the judgment of *Stephen, J.*, on further consideration.

This was an action against a building society, the mortgagees of certain land, upon a covenant to build and keep in repair houses erected upon the land. The facts were these:—

By an indenture dated the 17th of May, 1866, made between Charles Jackson and Edward Jackson, Charles Jackson granted a plot of land to Edward to the use that Edward should pay Charles an annual chief rent of £11, and Edward for himself, his heirs, executors, administrators, and assigns covenanted with Charles, his executors and assigns, that he Edward, his heirs and assigns, would pay Charles, his heirs and assigns, this rent half-yearly, and would erect and keep in good repair and, when necessary, rebuild, messuages on the land of the value of double the rent. On the 2d of March, 1867, Charles Jackson conveyed to Haywood to the use of Haywood, his heirs and assigns, the said chief rent and all powers and remedies in respect thereof, together with the benefit of the said covenant. Edward Jackson assigned his interest to MacAndrew. MacAndrew by a deed of the 8th of September, 1871, mortgaged the premises in question to certain persons described as the trustees of the Brunswick Building Society in fee subject to the rent-charge and covenants above mentioned. The building society was afterwards incorporated under the Act of 1874, and under the mortgage deed took possession of the land and the buildings on it. It was conceded on the one hand that buildings of the stipulated value had been erected upon the land, and on the other that they had not been kept in repair; and the question was whether, under the circumstances stated, the building society was liable upon the covenant to keep them in repair. No question arose as to their liability to pay the chief rent, as the arrears were paid into court in the action.

The case was tried before *Stephen, J.*, without a jury, at the Manchester Winter Assizes, 1881, who reserved it for further consideration, and after stating the facts as above, gave judgment as follows:—

The points argued in this case were two. It was affirmed by the plaintiff and denied by the defendants that the covenant in the deed of

a sale of that land, unless there is something to rebut it, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption." COLLINS, L. J., in *Rogers v. Hosegood*, [1900] 2 Ch. 888, 407.

One who subdivides a tract of land and sells lots from time to time, often finds it advantageous to restrict the lots sold or the lots still unsold, and yet retain the power to release or modify the restrictions; in short, to keep a power of control over the general plan. On this point see *Schreiber v. Creed*, 10 Sim. 9, 88; *Master v. Hansard*, 4 Ch. D. 718; *Everett v. Remington*, [1892] 3 Ch. 148.

1866 ran with the land, and that Haywood, as assignee of Charles Jackson, could therefore sue upon it the Brunswick Building Society, the mortgagees of the assignee of Edward Jackson. It was also affirmed by the plaintiff and denied by the defendants that the defendants being in possession of the property with equitable notice of the covenant, must perform it.

As to the first part of these arguments, I am disposed to think the case of *Milnes v. Branch*, 5 M. & S. 411, is an authority directly in point in favor of the defendants. It is true that Lord St. Leonards appears to disapprove of this decision (2 Vendors and Purchasers, 14th ed. p. 591, note); but I must regard it as a binding authority till it is overruled.

With regard to the second point, I think that the plaintiff's contention must prevail. The only distinction on which the defendants relied to take the case out of the ordinary rule as to persons in possession of land being bound to perform covenants relating to it of which they have notice, was that, though an equity to use property or to abstain from using it in a particular way may be so attached to land, a liability to repair or do similar acts cannot. I see no reason for this distinction, and it is directly opposed to the case of *Cooke v. Chilcott*, 3 Ch. Div. 694.

The result is that there must be judgment for the plaintiff, with costs. There will be no damages, the parties having agreed that if it is formally decided that the defendants are to put the buildings in repair, they must be repaired to the satisfaction of a gentleman agreed upon.

The defendants appealed.

Ambrose, Q. C., and *Henry* (*Crompton* with them), for the defendants.

Addison, Q. C., and *B. H. Collins*, for the plaintiff.

BRETT, L. J. This appeal must be allowed. I am clearly of opinion, both on principle and on the authority of *Milnes v. Branch*, that this action could not be maintained at common law.¹ *Milnes v. Branch* must be understood as it always has been understood, and as Lord St. Leonards (Sug. V. & P. 14th ed. p. 590) understood it; and it will be seen, on a reference to his book, that he considers the effect of it to be that a covenant to build does not run with the rent in the hands of an assignee.

This being so, the question is reduced to an equitable one. Now the equitable doctrine was brought to a focus in *Tulk v. Moxhay*, 2 Ph. 774, which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced. It

¹ In America, a covenant calling for action by the covenantor generally runs at law in aid of a grant in fee of an incorporeal hereditament. See *ante*, p. 371, note. Cf. *Van Rensselaer v. Read*, 26 N. Y. 558.

may be also, but it is not necessary to decide here, that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced. Be that as it may, a covenant to repair is not restrictive, and could not be enforced against the land; therefore such a covenant is within neither rule. It is admitted that there has been no case in which any court has gone farther than this, and yet if the court would have been prepared to go farther, such a case would have arisen. The strongest argument to the contrary is, that the reason for no court having gone farther is that a mandatory injunction was not in former times grantable, whereas it is now; but I cannot help thinking, in spite of this, that if we enlarged the rule as it is contended, we should be making a new equity, which we cannot do.

I think also that *Cox v. Bishop*, 8 De G. M. & G. 815; 26 L. J. Ch. 389, shows that a Court of Equity has refused to extend the rule of *Tulk v. Moxhay* in the direction contended for, and that if we decided for the plaintiff we should have to overrule that case. But it is said that if we decide for the defendants we shall have to overrule *Cooke v. Chilcott*. If that case was decided on the equitable doctrine of notice, I think we ought to overrule it. But I think there is much to show that the ground of the decision was that Malins, V. C., was of the opinion — wrongly as it now turns out — that the covenant ran with the land, and the decision of the Court of Appeal appears to have proceeded on an admission.

CORROX, L. J. I am of the same opinion on both points. I think that a mere covenant that land shall be improved does not run with the land within the rule in *Spencer's Case*, 1 Sm. L. C. 8th ed. at p. 89, so as to give the plaintiff a right to sue at law. I also think that the plaintiff has no remedy in equity. Let us consider the examples in which a Court of Equity has enforced covenants affecting land. We find that they have been invariably enforced if they have been restrictive, and that with the exception of the covenants in *Cooke v. Chilcott*, only restrictive covenants have been enforced. In *Tulk v. Moxhay*, the earliest of the cases, Lord Cottenham says: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using it in a particular way, is what I never knew disputed." In that case the covenant was to use in a particular manner, from which was implied a covenant not to use in any other manner; and the plaintiff obtained an injunction restraining the defendant from using in any other manner, although the covenant was in terms affirmative. At p. 778, Lord Cottenham says: "If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." This lays down the real principle that an equity attaches to the owner of the land. It is possible that the doctrine might be extended to cases where there is an equitable charge which might be

enforced against the land, but it is not necessary to decide that now; it is enough to say that with that sole exception the doctrine could not be farther extended. The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us in going that length. We are not bound here by *Cooke v. Chilcott*, and I do not think that the rule of *Tulk v. Moxhay* can be extended as *Malins v. C.*, there extended it. In *Morland v. Cook*, Law Rep. 6 Eq. 252, there are perhaps some expressions of Romilly, M. R., which favor the opposite contention; but the fact of there being a deed of partition in that case makes it distinguishable. That is the only case besides *Cooke v. Chilcott* at all in favor of the plaintiff. *Cox v. Bishop*, 26 L. J. Ch. 389, is distinctly the other way. There the covenants affected the owner, but not the land; and although the defendant was full equitable owner, the court refused an injunction. *Daniel v. Stepney*, Law Rep. 9 Ex. 185, where there was merely a grant of a rent to be distrained for on land adjoining the land demised, does not seem to me to be in point, and such observations of Bramwell, B., in *Aspden v. Seddon*, 1 Ex. Div. 496, as might possibly assist the plaintiff, are extra judicial. There is therefore no ground for extending the equitable doctrine as we are asked to do.

LINDLEY, L. J. I am of the same opinion. The practical question is, whether the defendants, being mortgagees in possession, are bound to repair under the circumstances of the case. It is said that the obligation to repair is imposed upon them because they took a conveyance of the land with notice of the covenant, and Stephen, J., has thought himself bound by *Tulk v. Moxhay* and *Cooke v. Chilcott*.

Now I may first say that I do not think that the defendants could be hit by any process of circuity of action. As mortgagees they took the land subject to the rent-charge no doubt, so far as the liability to distress and re-entry were concerned. I do not think that either covenant runs with the land. Neither *Milnes v. Branch*, 5 M. & S. 411, nor *Randall v. Rigby*, 4 M. & W. 130, however, applies very closely. In *Milnes v. Branch* the plaintiff was not assignee in fee of the rent, having only a leasehold interest in that rent. In *Randall v. Rigby* the question was whether debt or covenant was the proper form of action. There are *dicta* in the judgments, however, which favor the contention of the defendants in this case, and it is impossible not to see that the burden of the covenant does not run with the land. This is not a case of landlord and tenant; we must never lose sight of that distinction.

With regard to the question of notice, *Tulk v. Moxhay* shows that a restrictive covenant will be enforced; and so do *Cox v. Bishop* and *Wilson v. Hart*, Law Rep. 1 Ch. 463. But I think that the result of these cases is that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice. Especially does this appear from *Wilson v. Hart*, Law Rep. 1 Ch. 464, where a covenant not to use a house as a beer-shop was enforced against a purchaser's tenant from year to year.

It is absurd to suppose that such a tenant could have been compelled to perform a covenant to repair.

The principle of *Cooke v. Chilcott* may or may not be applicable to this case, but the circumstances were wholly different. I should be sorry to overrule that case, and prefer to leave it to be reconsidered on some future occasion. It is enough to say that in the present case we have been asked to extend *Tulk v. Moxhay* as it has never been extended before, and we decline to do so. *Appeal allowed.*¹

NOTTINGHAM PATENT BRICK AND TILE CO. v. BUTLER.

COURT OF APPEAL. 1886.

[Reported 16 Q. B. D. 778.]

APPEAL of the defendant from the judgment of *Wills, J.*, at the trial of the action in favor of the plaintiffs.

The action was brought to recover the sum of 610*l.*, which the plaintiffs had paid to the defendant as a deposit upon the purchase by the plaintiffs from the defendant of a plot of land containing about six and a half acres. The plot of land was put up by the defendants for sale by auction on the 26th of September, 1882, subject to certain conditions of sale, but was not then sold. Among the conditions were the following:—

“4. The property is sold subject to all tenancies, tenant rights, chief and other rents, tithe, rights of way, water, light, and other easements, and also to an arrangement entered into with the Nottingham Waterworks Co. for removing from time to time and laying down along the private road, called Plains Road, new main water-pipes, and also to the payment of a ratable proportion of the expense of keeping the said private road and gate at the end thereof next Mapperley Plains in good condition, and also subject to any matter or thing affecting the same, whether disclosed at the time of sale or not.”

“10. The title shall commence with an indenture of conveyance dated the 20th of May, 1868, and made between Conway Barnett of the first part, Harriett Maltby, spinster, of the second part, and Wm. Windley of the third part.”

“12. The property is believed to be, and is to be taken to be, correctly described, and any incorrect statement, error, or omission found in the particulars or these special conditions, is not to annul the sale, nor entitle the purchaser to be discharged from his purchase, nor is the vendor or purchaser to claim to be allowed any compensation in respect thereof.”

¹ See *Austerberry v. Oldham*, 29 Ch. Div. 750; *Clegg v. Hands*, 44 Ch. D. 508; *Bidwell v. Holden*, 68 L. T. R. 104.

Neither the particulars nor the conditions of sale contained any intimation that the land was subject to any covenants or conditions restricting the mode of its user by the owner. Shortly after the abortive auction, the plaintiffs, by their solicitor, Mr. Hind, entered into negotiations, first with the auctioneer, and then with the defendant himself, for the purchase of the plot of land, in the course of which the defendant told Mr. Hind that the land was subject to some restrictive covenants which would prevent its being used as a brickfield. The defendant's solicitor, Mr. Gilbert, who was present, was asked by Mr. Hind whether this statement of the defendant was correct, and he replied that he was not aware of any restrictions. Thereupon the defendant said that he had seen the restrictions in one of the old title deeds, and, upon Mr. Hind again appealing to Mr. Gilbert, the latter repeated that he was not aware of any restrictions. Mr. Gilbert, however, did not say that (as the fact was) he had not read the earlier title deeds, and knew nothing about their contents. Thereupon one of the directors of the plaintiff company, who was present, signed, on behalf of the company, a contract to purchase the plot of land in question for 6100*l.*, and a deposit of 610*l.* was paid to the defendant. The contract was made subject to the above-mentioned conditions of sale.

In December, 1882, the plaintiffs discovered for the first time that the land had formed part of an estate of about forty-three acres, which was on the 24th of March, 1865, put up by the then owners in fee for sale by auction in thirteen lots, the plot which the present plaintiffs had agreed to purchase from the defendant having been lot 11 at that sale. That sale was made subject to (*inter alia*) the following conditions:—

“15. All buildings to be erected on any part of the said lands shall be stone-colored, with slated roofs; and no building to be occupied as a public-house or workshop, or blacksmith's shop, or as a butcher's shop or slaughter-house, or chandler's house or shop, or as a shop for the sale of any article whatsoever, or for the purpose of using, working, or making any article of manufacture therein, shall be erected, or built, or so used upon any part of the land now offered for sale; nor shall any part thereof be used as a brickyard, or for the making of bricks, except Lot 13; and, in case the property shall be sold in lots, no house shall be erected on any part of the said land, except on Lot 13, at a less cost than 400*l.*”

“16. The purchaser of the property, or of each lot, in case the same shall be sold in lots, shall enter into all such covenants with the vendors as the vendors' counsel shall deem necessary or proper for securing the performance of these conditions on the part of such purchaser, which covenants shall be inserted in his deed of conveyance; and he shall also, in conjunction with the other purchasers (if any), enter into and execute a separate deed containing like covenants with the vendors, such separate deed being prepared at the expense of the vendors, but perused on behalf of such purchaser or purchasers respectively, and executed at his or their expense.”

At this sale only Lots 1, 2, and 12 were sold. In February, 1866, there was a second auction, at which Lots 6, 7, and 8 were sold. In October, 1867, there was a third auction, at which Lots 9 and 10 were sold. Lots 3, 4, and 5 were sold respectively in 1865, 1866, and 1867, by private contract to different purchasers. Lot 11 was also sold by private contract, and was conveyed to Barnett, the purchaser, by a deed dated the 4th of September, 1866, which deed contained a restrictive covenant by the purchaser with the vendors in accordance with the above conditions of sale. Lot 13, which was then a brickfield, was sold in June, 1866, by private contract, and the conveyance of it to the purchaser contained, with the exception of a permission to build a blacksmith's shop, a covenant embodying such of the restrictions as were applicable to that lot. On the evidence, the Court was satisfied that all the lots were sold subject to the original conditions of sale, and that each of the purchasers entered into restrictive covenants with the vendors in accordance with those conditions, the covenants being modified in the case of Lot 13 as above stated.

The defendant purchased Lot 11 in 1877 from William Windley. The conveyance to Windley contained no reference to the restrictive covenants. The defendant alleged (though this defence was not much insisted on before Wills, J., at the trial) that he bought the property without any notice of the restrictive covenants, and that he discovered their existence afterwards on looking at the conveyance to Barnett.

The plaintiffs, on discovering the restrictive covenants, brought this action, claiming the return of their deposit. The defendant delivered a counter-claim for the specific performance of the agreement to purchase.

Wills, J., gave judgment for the plaintiffs on the claim and the counter-claim. The defendant appealed.

A. Charles, Q. C., and W. Graham, for the defendant.

Cookson, Q. C., Darling, Q. C., and R. M. Bray, for the plaintiffs, were not heard.

LORD ESHME. I am of opinion that the decision of Wills, J., must be affirmed.

One fact in the case was not clearly brought before Wills, J., but, assuming the facts to be as he considered that they were, I think his judgment was right in every particular. The first point he had to consider was, whether there were with regard to this property restrictive covenants which could be enforced by any one of the purchasers of other parts of the estate of which this property had formed part against any other. It has been argued that there are no restrictive covenants capable of being enforced in that way, because there was no covenant, either in writing or otherwise in express terms, that each covenantor — each original purchaser — would consider himself bound to the other purchasers, and there was no covenant by the original vendor. But I think that Wills, J.'s, view of the law on this subject is perfectly correct. In my view he is right in saying that, when an estate is put up

for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question, whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention. And, if it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a Court of Equity will, in favor of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter.

Now in the present case the property was originally put up for sale in lots, and it seems to me that the evidence is conclusive that the vendor, at the time when he first put it up to be sold by auction in lots, intended to sell the whole property, and that his intention to sell the whole was clearly published, so that every one who was present at that auction must have known that he was intending to sell the whole, and, as the purchasers were to enter into restrictive covenants, it follows that the purchasers must have known that those covenants were really intended for the benefit of each of them as against all the rest. But it is said that the whole of the property was not sold at once; some parts of it were sold at the first auction, and other parts were not sold till afterwards. That is true, and it is also true that the subsequent sales were at considerable distances of time after the first. That would be a circumstance to be taken into account in considering what was the view of the later purchasers, if that was material. But it is impossible, in my opinion, to say that the mere fact that the lots were not all sold on one day can make any difference. Lapse of time is not of itself a bar to the liability of the purchasers *inter se*; it is a matter to be taken into consideration, but it is not a bar. In the present case I think the evidence is conclusive that the sale of every one of the lots was made under the original conditions, and under the authority which was given on the first occasion, when the vendor put up the whole of the lots for sale. The lots were not all sold on the first occasion only because there were not bidders for them all, but no new instructions were given to the auctioneer for the subsequent sales, no new bargain was made with him, no charges were made by him for altering any of the conditions.

There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no then existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up

for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others.¹

Then it is said that there is no one who could enforce these covenants. But, if all these sales were parts of the one original sale, and the covenants were entered into by each purchaser for the benefit of the other purchasers, each of them could insist on the performance of the covenants by the others.²

Wills, J., thought that there was no evidence that the defendant did not buy his lot with notice of the restrictive covenants, and, if that were true, the property came down to him still bound by those covenants in favor of the other purchasers. It was argued that, even though the restrictive covenants would have been binding on Butler,

¹ "[*Nottingham Patent Brick & Tile Co. v. Butler*] is cited as an authority for the contention that the restrictive covenants are only enforceable by a purchaser when the vendor sells the whole of the property. I cannot come to that conclusion. I take the same view as Mr. Justice Wills, that it is a question of fact, to be deduced from all the circumstances of the case, whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. The Master of the Rolls seems to have been of that opinion also, though in the judgment referred to he was speaking of a case where the vendees disposed of the whole estate. He says that if the vendor does not reserve any part, 'that is almost if not quite conclusive (unless there is something contradictory);' but that language appears to concede that the conclusion may be rebutted by something else. Though the retainer by the vendor of some part of the property is a highly important element, it is after all only an element to be taken into consideration along with other circumstances in ascertaining the intention. It appears to me that although the vendor may not part with his whole estate, there may be circumstances which show that the intention was that each purchaser should be entitled to enforce building restrictions against the vendor and every other purchaser." STIRLING, J., in *In re Birmingham and District Land Company*, [1898] 1 Ch. 342, 349.

² "But for a technical difficulty which was not raised before Farwell, J., we should agree with him that the benefit of the covenants in question was annexed to and passed to Sir John Millais by the conveyance of the land which he bought in 1873. A difficulty, however, in giving effect to this view arises from the fact that the covenants in question in the deeds of May and July, 1869, were made with the mortgagors only, and therefore in contemplation of law were made with strangers to the land, to which, therefore, the benefit did not become annexed. That a court of equity, however, would not regard such an objection as defeating the intention of the parties to the covenant is clear; and, therefore, when the covenant was clearly made for the benefit of certain land with a person who in the contemplation of such a court was the true owner of it, it would be regarded as annexed to and running with that land, just as it would have been at law but for the technical difficulty." LINDLEY, L. J., in *Rogers v. Hosegood*, [1900] 2 Ch. 388, 404.

yet they would not bind the plaintiffs, because they had no notice of them before they entered into their contract. I cannot follow that argument, and I think the learned judge was right as to that. It was said that Butler at all events made no statement to the plaintiffs with regard to the absence of restrictions, but, when you look at the conversation between Butler and his solicitor and the plaintiffs or their agent, it seems to me that Wills, J., has treated that matter very mildly indeed. But, supposing he was right in the view which he took of that, and that the case stands in the same position as if no statement had been made, then it is said that by reason of the conditions of sale and of the provisions of the Conveyancing Act, although there is a defect in the title, yet it can be forced upon the purchasers. It seems to me an astounding proposition that a vendor can by means of such conditions of sale force upon a purchaser a defective title, even though he (the vendor) knew of the defect. Now, that Butler did know of the defect seems to have been assumed by Wills, J.; if you treat him as dealing himself with the purchasers he knew of the defect, and, if the conversation between his solicitor and the plaintiffs' solicitor, at which he was present, amounted to nothing at all, then it comes to this, that he, knowing the defect, by his agent put forth the condition of sale. If that is so, the case is absolutely within the authority of *Haywood v. Mallalieu*, 25 Ch. D. 357, as it seems to me. It is impossible for a vendor, knowing of a defect in his title, either by himself or his agent to put forward conditions of sale which are to force upon a purchaser a bad title of which he knew, but which he did not disclose. A Court of Equity would not be of much use if it could not meet such a case as that, and it seems to me clear that a Court of Equity would never have enforced a contract under such circumstances. Does the Conveyancing Act make any difference? I entirely agree that, whatever construction you put upon it, it cannot have that effect. It cannot cure that defect in the title of the defendant. If that is true there was a defect in the defendant's title, and he was insisting that the Court should force on the purchasers from him a bad title. The Court will not do that. He cannot have specific performance of the contract when he has a bad title which was within his knowledge, and it seems to me that he cannot keep the deposit. Therefore, Wills, J., was right from this point of view.

But the case comes before us on another point of view. It is said, and I will now assume that the fact is so, that Butler was a purchaser for value without notice of the restrictions, and then it is said that, if the plaintiffs took a conveyance from him, they would not be subject to the restrictions. As at present advised I think that would be so, and that, when once there has been a purchaser for value without notice of the restrictions, the restrictions are gone, and a good title can afterwards be made free from them. But the title would then depend upon the question whether the previous purchaser did buy without notice; that must always be a question of fact and a matter of evidence, and

a title depending upon evidence of matters of fact is a title which is capable of being disputed in a Court of Law, and, although the plaintiffs would in point of law, if the alleged fact was true, get the property free from the restrictions, yet in all probability, or almost certainty, they would be buying a lawsuit in order to get their title clear. Under such circumstances, where the rectitude of the title depends upon facts which very probably will be disputed, and are certainly capable of being disputed, a Court of Equity will not, as I understand, enforce the contract. Therefore, in that view also, the defendant would not be entitled to specific performance of the contract. But still, if there were nothing else in the case, I think he could not have been compelled to give back the deposit.

This obliges us to enter into the disagreeable question whether Wills, J., in his comments upon what took place at the interview at which the contract was signed, has not been too lenient. The evidence has been read to us, and I am sorry to say that I have come to the conclusion that the defendant's solicitor allowed himself to be carried away by his zeal for his client, and that he did not act with that candor to the other side with which a solicitor is bound to act under such circumstances. He allowed himself, in his zeal for his client, to make statements which were calculated to lead the other side to believe that he was stating facts within his own knowledge, and his statements in fact misled them, so that what he said amounts to a mis-statement of facts.¹ If that is so, and what he said was said in the presence of the defendant, it seems to me that Wills, J., was too lenient in saying that he was not acting as the agent of the defendant. The solicitor was intrusted with the sale, and his client stood by him and made a statement to the purchaser, but the solicitor, the person upon whom the purchaser would naturally rely (as the defendant, if he had thought for a moment, must have known) as to such a matter more than on the client, immediately contradicted his client, and said that which to my mind was equivalent to saying, "My client, who says he has read the deeds, does not understand them; he is mistaken, and I tell you there is no such restriction." That was the natural interpretation of what he said, and to my mind it is clear that the plaintiffs, in entering into the contract and paying the deposit, relied upon that statement of his which, under the circumstances, was equivalent to a mis-statement. That being so, I think the defendant cannot keep the deposit. So that, in this point of view also, the decision of the learned judge is right, and the appeal must be dismissed.

I should have said that of course upon this mis-statement all other questions fall to the ground. The moment we find there was this mis-statement, it is obvious that the contract could not be enforced against the plaintiffs.

*Appeal dismissed.*¹

¹ The concurring judgments of LINDLEY and LORNE, L. JJ., are omitted.

HALL v. EWIN.

COURT OF APPEAL. 1887.

[Reported 87 Ch. D. 74.]

THE plaintiff, W. H. Hall, was the owner of a house in Edgware Road, in the parish of Paddington. By an indenture dated the 3d of November, 1849, the plaintiff granted a lease of the house to G. Tarlington for eighty years. The lease contained a covenant by the lessee for himself, his heirs, executors, administrators, and assigns, in the following terms: "That he, his executors, administrators, and assigns, shall not at any time during the said term use, exercise, or carry on in or upon the said hereby demised premises, or permit or suffer any part thereof to be occupied by any person or persons who shall use, occupy, or carry on therein any noisome or offensive trade, business, or employment whatsoever without the like consent in writing of the said W. H. Hall, his heirs or assigns, first obtained."

By an indenture dated the 11th of January, 1851, G. Tarlington demised the premises to R. S. Ruddach for the residue of the term of eighty years, except the last three days thereof, by way of mortgage for securing the repayment of a principal sum and interest.

By an indenture dated the 19th of September, 1865, the executors of R. S. Ruddach, under the power of sale contained in the mortgage deed, assigned the premises for the residue of the term of eighty years, except the last three days thereof, to the defendant John Ewin.

By an indenture dated the 29th of October, 1885, the defendant John Ewin demised the premises to the defendant George McNeff for twenty-one years. This lease contained the following covenant by McNeff: "And also shall not at any time during the said term use, exercise, or carry on in or upon the said demised premises any noisome or offensive trade, business, or employment whatsoever without the like consent in writing of the said John Ewin, his executors, administrators, or assigns, first obtained."

In the month of February, 1886, the defendant McNeff purchased some lions, and opened an exhibition of wild beasts on the premises. He exhibited pictures outside the house, and employed black men to parade in front of it with a gong and trumpet, so that the neighbors complained of the nuisance.

The present action was brought by W. H. Hall and C. Breitbart, who was a carver and gilder, keeping a shop two doors from the premises in question, asking for an injunction to restrain Ewin and McNeff from using the premises as an exhibition of wild animals, or otherwise so as to cause a nuisance to the plaintiffs, and also from carrying on upon the premises, or permitting or suffering any part thereof to be occupied by any person carrying on, any noisome or offensive trade or business without the consent in writing of the plaintiff W. H. Hall.

In his defence the defendant Ewin pleaded that if the allegations in the statement of claim were correct they created no cause of action against him, that none of the acts complained of had been committed by him, and that he had given no consent in writing to the acts complained of; but, on the contrary, he had done all in his power, save by bringing an action, to induce McNeff to desist from any acts which might cause annoyance to the neighborhood, and that he was not liable for the alleged acts of McNeff.

The existence of the nuisance was sufficiently proved by the evidence. There was no evidence of Ewin having in any way encouraged or consented to the exhibition complained of. Three letters were put in evidence from the plaintiffs' solicitors to Ewin, dated the 9th and 15th of February, and the 13th of March, 1886, complaining of the nuisance, to which Ewin made no reply. It also appeared that on the 12th of March the clerk of the plaintiffs' solicitors called on Ewin. The latter was ill and did not see him, but sent a message down to him that he would speak to McNeff at once upon the subject. On the 15th of March McNeff wrote to the solicitors stating that he had closed the exhibition out of respect to the wishes of his landlord. It was not, however, really closed for two or three days afterwards.

On the 18th of March the plaintiffs issued the writ in the action, asking for an injunction and damages; and on the following day gave notice of motion for an interim injunction, which was granted.

The case was heard on the 3d of May, 1887, before Mr. Justice *Kekewich*. His Lordship was of opinion that although Ewin was not an assignee of the lease, he was equitably bound by the covenant, and that as he had the power to enforce his own covenants against McNeff and to stop the nuisance, he had broken the covenant against suffering the premises to be used for the purpose of carrying on a noisome occupation. He therefore granted the injunction against both of the defendants, with costs. From this judgment the defendant Ewin appealed.

Romer, Q. C., and Farwell, for the appellant.

Warmington, Q. C., and Sturges, for the plaintiffs.

*Corrigan, L. J.*¹ This is an appeal by the defendant Ewin against a judgment of Mr. Justice *Kekewich*, granting an injunction restraining him from the breach of a certain covenant in a lease. Is this right? Ewin is in this position. The plaintiff Hall granted a lease containing the covenant in question, and the lessee made a mortgage of the lease by underlease, and the mortgagee sold his interest under his power of sale to Ewin; therefore Ewin was merely an underlessee and was not bound at law by the covenants in the original lease. He would have been bound if he had taken an assignment of the estate of the lessee under the lease, but he took no such assignment. It is useless to consider whether if Ewin had been bound at law the plaintiff

¹ The concurring opinions of *Lindley* and *Lorne, L. JJ.*, are omitted.

could have maintained an action against him and got damages. If the plaintiff is entitled to relief in this case it must be not on the ground of breach of covenant, but on the ground that he is equitably bound, on the principle laid down in *Tulk v. Moxhay*, 2 Ph. 774, to use the house in conformity with the covenants in the lease. I am of opinion that it would be an extension of the principle of *Tulk v. Moxhay* to hold him liable to an injunction in such a case as this. The words of the covenant in the original lease are these. [His Lordship read the covenant.] Then what are the facts? The defendant Ewin, who was himself an underlessee, granted an underlease to McNeff, in which there was a covenant that he could not exercise any noisome or offensive trade or business without the consent in writing of Ewin. If the plaintiffs had shown that Ewin had granted this underlease for the purpose of its being used for an offensive trade or had granted a written license to McNeff so to use it, he would have acted in a way inconsistent with the covenants in the original lease, and I should have had no hesitation in granting an injunction against him; but he has done nothing of the kind, and the case made against him is that by standing by and allowing the house to be used for the exhibition of wild beasts, he has acted in violation of the covenant. I give no opinion whether the plaintiff would have had a right of action against him if he had been bound in law by the covenant. There is no doubt that under the principle of *Tulk v. Moxhay*, 2 Ph. 774, if a man had actually done anything in contravention of the covenants of which he had notice, the court would grant an injunction. As I understand *Tulk v. Moxhay*, the principle there laid down was that if a man bought an underlease, although he was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants the Court of Chancery could not allow him to use the land in contravention of the covenants. That is a sound principle. If a man buys land subject to a restrictive covenant, he regulates the price accordingly, and it would be contrary to equity to allow him to use the land in contravention of the restriction. But here the plaintiff does not seek to restrain Ewin from using the house in a particular way, or from doing something which will enable the tenant so to use it, but to compel him to bring an action against his tenant who is in possession of the house. The principle of *Tulk v. Moxhay* has never been carried so far except in a case before Vice-Chancellor Malins: *Cooke v. Chilcott*, 3 Ch. D. 694. The question came practically before the Court of Appeal in *Haywood v. Brunswick Permanent Benefit Building Society*, 8 Q. B. D. 408, and the court there laid down that the principle in *Tulk v. Moxhay* was not to be applied so as to compel a man to do that which will involve him in expense. The covenant in *Haywood v. Brunswick Permanent Benefit Building Society* was to repair buildings on the land, and was therefore as much with reference to the land as the covenant in this case, but the court would not compel the defendant, who was the assignee of the original grantee, to repair the buildings.

There is no evidence in this case that the defendant Ewin has given any license to his tenant to do the act complained of. I think it would be wrong to make an order that would have the effect of compelling him to bring an action, or of making him liable to damages if he did not bring an action. It is said that he did nothing to prevent the use of the house in the way complained of. But before the action was brought it appears from the evidence that the clerk of the plaintiffs' solicitor called at the house of the defendant Ewin, and that Ewin informed him that he would see McNeff about the matter, and then the plaintiff himself puts in evidence a letter from McNeff saying that out of respect to Ewin's wishes he had stopped the exhibition. It is true that the statement of McNeff, that the exhibition was closed, was false, but the plaintiff has not proved that it was false that Ewin had requested him to stop it. So that on the evidence it stands that there is no proof that the defendant gave permission to his tenant to open the exhibition, but it does appear that he spoke to him and requested him to discontinue it. I think it would be wrong to grant an injunction against Ewin under these circumstances. The injunction against him must therefore be discharged.

With respect to the costs, I was at first of opinion that, having regard to the fact that Ewin did not answer the letters sent to him by the plaintiffs' solicitor, the action ought to be dismissed against him without costs; but considering the fact that before the action was brought the clerk of the solicitor was told that the defendant was doing something to induce his tenant to stop the exhibition, I think we cannot do otherwise than dismiss the action against him, with costs, in the usual way.¹

ASHBY v. WILSON.

CHANCERY DIVISION. 1899.

[Reported [1900] 1 Ch. 66.]

By an indenture of a lease dated November 27, 1893, the defendant Wilson, who was the owner of houses numbered 1, 2, 3, 4, 5, and 6, The Broadway, Church End, Finchley, demised to H. T. Bigglestone a shop, No. 3 of the houses, for the purposes of the business of a fruiterer, greengrocer, and corn-chandler for the term of twenty-one years. The lease contained a covenant by the lessee not to carry on or permit to be carried on any noisome trade upon the premises, and to use the same as and for the business of a fruiterer, greengrocer, and corn-

¹ Equity will enforce a restrictive covenant against a mere occupier with notice. *Mander v. Falcke*, [1801] 2 Ch. 554.

As to various questions concerning the running of restrictive covenants in leases of "tied" public-houses, see *Clegg v. Hands*, 44 Ch. D. 503; *White v. Southend Hotel Co.*, [1897] 1 Ch. 767.

chandler only, and a covenant by the lessor that he would not let any of the other five houses for the purposes of the trades of a fruiterer, greengrocer, or corn-chandler.

On August 2, 1898, the lease was assigned by Bigglestone to the plaintiff, and he carried on upon the demised premises the businesses of a fruiterer, greengrocer, and corn-chandler.

On June 29, 1897, Wilson granted a lease of No. 1, The Broadway, to the defendant Bebb for thirty-three years from November 26, 1896. This lease contained a covenant by Bebb that he would use the premises as and for an oil, color, and Italian warehouse only.

The plaintiff had, as he alleged, ascertained that the defendant Bebb had recently commenced to sell oranges, lemons, apples, onions, barley, maize, oats, birdseed, and dog-biscuits.

The plaintiff brought this action for an injunction to restrain the defendant Wilson from letting or continuing to let the premises, No. 1, The Broadway, to the defendant Bebb or any other person for the purposes of the trades of a fruiterer, greengrocer, or corn-chandler, or from permitting the premises to be used for the purposes of these trades, in contravention of the covenant contained in the lease to the plaintiff of November 27, 1893. He also asked for an injunction to restrain the defendant Bebb from using the same premises for the purposes of the above-mentioned trades.

It was admitted by Bebb that he had sold all the articles complained of (except apples), but as to barley, maize, and oats, only in small quantities as food for poultry; and he alleged that it was within the scope of an oil, color, and Italian warehouseman's trade to offer these articles for sale; and that ever since he first took the shop in 1884 (under a former tenancy) he had openly sold the articles complained of.

There was evidence of a conflicting character as to whether the sale of the articles complained of did or did not come within the business of an oil, color, and Italian warehouse; but there was no evidence of the existence of any general scheme as to building or user affecting the property of Wilson, and the only question calling for a report is whether, assuming that there had been a breach by the defendant Bebb of the covenant by him contained in the lease to him by Wilson of June 29, 1897, it was competent for the plaintiff, by reason of the covenant contained in his lease from Wilson or otherwise, to maintain any action against Bebb.

P. O. Lawrence, Q. C., and Gerald J. Wheeler, for the plaintiff.

R. J. Parker, for the defendant Wilson.

Warrington, Q. C., and George Cave, for the defendant Bebb.

KEKEWICH, J. The question of fact in this case is whether the defendant Bebb is carrying on the businesses of a fruiterer, greengrocer, or corn-chandler, either one or other of them. By the restrictive covenant contained in his lease, he is bound to carry on the business of an oil, color, and Italian warehouseman only, and if he is carrying on the business of a fruiterer, greengrocer, or corn-chandler, he is in-

fringing that covenant; and, moreover, beyond that, he is carrying on the business which the plaintiff is at liberty to carry on, and is thereby entering into competition with him, and probably doing him harm. Now, on that question, notwithstanding the conflict of evidence, I confess I have no hesitation in holding that the defendant Bebb is carrying on the businesses of a fruiterer, greengrocer, and corn-chandler, all three. It is enough if he is only carrying on one of them. [His Lordship then examined the evidence on the point, and continued :—]

It being, then, ascertained that Bebb has committed a breach of covenant, there arises a difficult and interesting question of law as to whether the plaintiff can sue Bebb for that breach. There is no covenant between the plaintiff and Bebb. There is no evidence to show that there is any contract between them resting upon a building scheme or anything of that kind. The doctrine of *Tulk v. Moxhay*, 2 Ph. 774, has been referred to, but the question in this case really depends upon the covenants made with the lessor, Wilson. It is clear that the plaintiff cannot sue Bebb directly; but can he sue Bebb through Wilson? He can do so if he is entitled to call upon Wilson to sue Bebb; and in such a case it would be convenient and right for him simply to join Wilson as a party, and thus, by a short cut, sue Bebb through Wilson. It is only fair to notice that Wilson has never been remiss. He has endeavored to do his duty as lessor. He has not sued Bebb, but he has not made the slightest difficulty about this action, and has been willing to see justice done between his tenants. But, in order to determine whether the plaintiff can compel Wilson to sue, it becomes necessary to consider what the covenant is into which Wilson has entered with the plaintiff. It is contained in the lease of November 27, 1893, of which the plaintiff is the assignee. [His Lordship referred to the terms of the lease, and continued :—] The plaintiff, then, is bound to use the premises as and for the trades of a fruiterer, greengrocer, and corn-chandler only, and, as the consideration for that, Wilson, the lessor, binds himself not, during the continuance of the demise, to let any of the other houses for the purpose of those trades. That covenant has not been broken by Wilson, because in the lease from him to Bebb there is inserted this special covenant that Bebb is to use his premises as and for an oil, color, and Italian warehouse only. Wilson has, therefore, done his duty; and, that being so, what claim has the plaintiff against him? I can see none at all. What Mr. Lawrence asks me to do is to construe this covenant of Wilson's with the plaintiff so as to mean something quite different from that which the words themselves import. I do not think any words would justify Mr. Lawrence's argument, except such as these: "and that during the continuance of this demise the other houses shall not be used, &c."; and even if these words were in the covenant there might be some difficulty; but I think that nothing less explicit than words such as those would suffice.

I am then asked to say that, although Wilson has not broken his contract with the plaintiff, the plaintiff is entitled to call upon Wilson

to sue Bebb. The answer to that is to be found in a few words of Cotton, L. J., in *Kemp v. Bird*, 5 Ch. D. 978. He says: "I know of no authority for saying that under such circumstances as these" — and for my purpose I think the circumstances here are sufficiently similar — "a landlord is a trustee for his tenant in the sense that he must, at the request of the lessee, enforce a covenant against another lessee." I am asked to say that Wilson is bound to enforce against Bebb the covenant into which Bebb has entered with him because he has himself entered into another covenant with the plaintiff, which covenant he has faithfully observed. It seems to me that to hold that would be to contradict *Kemp v. Bird*, 5 Ch. D. 549, 974, which negatives the wider construction of Wilson's covenant with the plaintiff, and negatives also, I think, the right of the plaintiff to sue here. But then it is said I am prevented from holding that by the decision in the case of *Fitz v. Iles*, [1893] 1 Ch. 77. Mr. Lawrence says that if the two cases are inconsistent, as they are both decisions of the Court of Appeal, this court ought to follow the later decision; but I do not think that it is safe to say that what is last is necessarily best. I confess to having great difficulty in saying that this point of law never occurred to the learned counsel and judges in the case of *Fitz v. Iles*, [1893] 1 Ch. 77; but I feel that it is possible, because it is obvious from all the reports of the case that the whole contest was devoted to the question of construction — that is, whether there was an infringement of the covenant — and not the question of the right to sue on the covenant. The present Master of the Rolls in giving judgment seems to put that beyond question. He says that the right of the plaintiff lessee to sue the defendant lessor and lessee if they were breaking the covenant was "not in controversy," that the lessor was a party, and that "there was no difficulty about it."

Whatever inconsistency there is between *Fitz v. Iles*, [1893] 1 Ch. 77, and *Kemp v. Bird*, 5 Ch. D. 549, 974, must be got rid of on some other occasion. *Kemp v. Bird*, 5 Ch. D. 549, 974, was not cited in *Fitz v. Iles*, [1893] 1 Ch. 77, and I think that *Kemp v. Bird*, 5 Ch. D. 549, 974, is exactly in point here, and is binding upon me. I think, therefore, that the plaintiff's case fails. I do not think the defendant Bebb has been in the right: I think he has been doing wrong; but, on the other hand, as the plaintiff has come here, and the court is compelled to hold that he has no right to sue, I do not think I ought to deprive Bebb of his costs simply because I think there has been some want of propriety on his part. Wilson, who has done no wrong, must of course have his costs. I therefore give judgment for the defendants with costs.¹

¹ See *Andrew v. Aitken*, 22 Ch. D. 218.

If the circumstances show a general plan that a building shall be used as an apartment house, a tenant of one of the apartments may restrain the landlord from converting other parts of the building into a club-house. *Hudson v. Cripps*, [1896] 1 Ch. 265.

TALLMADGE v. EAST RIVER BANK.

NEW YORK COURT OF APPEALS. 1862.

[Reported 26 N. Y. 105.]

APPEAL from the Superior Court of the city of New York. Action to restrain the defendants, who owned the lot on the northeast corner of Eighth Street and Third Avenue in the city of New York, from erecting a building thereon covering the whole lot, and to require them to leave a space of eight feet between the building and the line of the street, in conformity to the plan on which the dwellings of the plaintiffs and other proprietors of adjacent lots were located. From the pleadings, and the finding of the judge before whom the cause was tried, these facts appeared: In 1829, a strip of land, sixty feet in width from the Second to the Third Avenue, was conveyed to the city of New York for the purposes of a public street. It was accepted by the city, and became a part of Eighth Street, as it was then called. On and prior to February, 1831, and before any of the land had been built upon, one Davis became the owner of all the lots on both sides of this street. Davis made a map of the street between the Second and Third Avenues, in which the street was shown as seventy-six feet wide, eight feet being added on each side. He called the avenue, thus widened, St. Mark's Place. This was before he sold or built on any of the lots. Soon thereafter, in conformity with this plan, Davis erected sixteen dwelling-houses on the south side of the street, and thirteen on the north side. They were of a superior class, all upon one uniform line, eight feet back from the original line of the street, the eight feet being devoted to doorsteps and areas enclosed in iron fences. When Davis sold any of the houses or lots, he exhibited this plan to the purchasers, and represented to all who had purchased that the street was always to remain as laid out, and that, when he so formed and laid out the street and built thereon, he gave up and dedicated the strip of eight feet of land on each lot to be used as a part of the Place in the manner it has since been used. It would appear that the effect of this plan of building was to save the sidewalk from the encroachment that it would otherwise have suffered from the projection of the doorsteps, and thus, in effect, to widen the available footpath. In October, 1832, after sales to the plaintiffs, Davis sold two lots to one Henriques. The conveyance, though absolute in form, appears to have been in the nature of a mere security, Davis retaining the right to dispose of the property and account for the proceeds. In 1833 he negotiated the sale of these lots to one Wilkes, showing to him the plan, or diagram before mentioned, and declaring his intention that the buildings to be erected thereon should be set back eight feet from the original line of the

street. On one of these lots, which was on a corner, Wilkes erected a building, owned by the defendant at the time of commencement of this suit, and which it was preparing to tear down. This building and two others erected by Wilkes were located in conformity to the line previously adopted and built upon by Davis. The deeds of Davis were absolute and unrestricted, conveying the legal title to the entire lots as bounded by the original line of the street. One of the mesne conveyances under which the defendant derived title refers to a "certain court-yard of eight feet in width," as included in the premises, and at the end of the *habendum* clause are the words: "Subject to all restrictions and covenants, if any exist, in relation to keeping the court-yard perpetually open as said court-yard." The defendant bought, it was found by the judge, with notice that it was claimed there were restrictions which would prevent it from acquiring a right, as purchaser of the lot, to build upon the eight feet described as court-yard.

The judge found, as a conclusion of law from these facts, that Davis had made a valid dedication of the eight feet of land on each side of the street, and that its validity is not affected by the fact that it was made with the intention and understanding that the proprietors of lots should be at liberty to enclose eight feet as an area or court-yard. He ordered judgment for the relief demanded in the complaint. The judgment was affirmed at General Term, not on the ground of dedication, but on the ground that, the original purchasers having verbally agreed to, and executed a plan for, the improvement of the Place, they were bound to adhere to it, and the defendant, purchasing with notice, took subject to the same equity. The defendant appealed to this court.

William Allen Butler, for the appellant.

Richard Mott, for the respondent.

SUTHERLAND, J. It is very plain that this action could not be maintained on the ground that the strip of ground, eight feet in width, which it was the purpose of the action to restrain the defendant from building on, had been dedicated to the public. The deeds from Davis to Henriques, and from Henriques to Wilkes, which were deeds with full covenants, bound the lots on the original line of the street, sixty feet in width; thus including the strip of land in question. Usually, when land is dedicated to public use, the owner retains the legal title. No doubt there may be an express dedication by deed; but, as the public cannot be a grantee, or the grantees, when there is an express dedication by deed, the deed must be to an individual, or body corporate, capable of being a grantee, and of holding for the use of the public. Neither of the deeds before mentioned declared any such public use or trust; and the covenants in the deeds would seem to be inconsistent with an intention by such deeds to dedicate the strip of land to public use. The deeds from Davis to Maxwell, one of the plaintiffs, convey with full covenants

to the street line, and without any restriction, stipulation, or dedication as to the eight feet. The making and exhibition of the map of St. Mark's Place by Davis, showing an open space of seventy-six feet in width, that is, eight feet on both sides wider than the original street, was perfectly consistent with an intention on the part of Davis to appropriate these strips of eight feet in width, on both sides of the original street, to the private use of the occupiers of the lots on both sides of the street; and the case shows that these strips of eight feet on each side have been enclosed in court-yards, with iron railings. The judge who tried the case at Special Term did not find as a fact that these strips of eight feet in width had been used by the public. There is no fact found, or admitted by the pleadings, from which an acceptance by the public of any intended dedication can be inferred. It appears to me plain, then, that the judgment in this case cannot be affirmed on the ground of dedication.

But I think the action could be maintained, and that the judgment below can be affirmed, on another principle.

From the facts found by the judge at Special Term, it appears that when the plaintiff Maxwell and others bought lots in St. Mark's Place of Davis, they were shown the map or plan of St. Mark's Place, showing that the houses on both sides of the Place were to be set back eight feet from the street, and that they bought on the assurance of Davis that that plan should be observed in building on the Place; that the strips of eight feet in width on both sides of the street should not be built upon, but kept open. It is to be presumed that they would not have bought and paid their money except upon this assurance. It is to be presumed that, relying upon this assurance, they paid a larger price for the lots than otherwise they would have paid. Selling and conveying the lots under such circumstances and with such assurances, though verbal, bound Davis in equity and good conscience to use and dispose of all the remaining lots so that the assurances upon which Maxwell and others had bought their lots would be kept or fulfilled. This equity attached to the remaining lots, so that any one subsequently purchasing from Davis any one or more of the remaining lots, with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity.

In *Tulk v. Moxhay*, 11 Beav. 571, a covenant by the grantee of a piece of land to use it as a private square was enforced against a purchaser from the grantee with notice. The Lord Chancellor said the question was, not "whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased." He then states this principle as an answer to the question: "If an equity attached to the property by the owner, no one purchasing with notice of that equity can stand in a different

situation from the party from whom he purchased." See also *Patching v. Dobbins*, Kay, 1; *Coles v. Sims*, Id. 56; *Rankin v. Huskinson*, 4 Sim. 13; *Whatman v. Gibson*, 9 Id. 196; *Schreiber v. Creed*, 10 Id. 9.

In *Hill v. Miller*, 3 Paige, 254, where M. had purchased land in a village adjoining a public street, and it was at the same time agreed between him and the vendor that a triangular piece of ground belonging to the vendor on the opposite side of the street should never be built upon, but should be deemed public property; and the vendor executed to M. a deed of the land sold, and a bond for the performance of the agreement as to the triangular piece of land, both instruments being duly proved and recorded; and H. afterwards purchased of M. the land opposite the triangular piece, after being informed by him of the privilege secured by the bond, — it was held, that H. was entitled to the benefit of the easement, and that M. could not, without his consent, be permitted to make a new arrangement with the holders of the legal estate in the triangular piece of land, by which buildings should be erected thereon.

In *Barrow v. Richard*, 8 Paige, 351, where the owner of a block of ground in the city of New York divided it into lots, and sold the lots from time to time to different individuals, and the conveyances of the lots contained mutual covenants between the grantor and grantees respectively against the erection of any livery stable, slaughter house, glue factory, &c., upon any part of the lots conveyed, or the carrying on of any manufactory, trade or business, which might be in any wise offensive to the neighboring inhabitants; it was held that the covenants in the deeds of the different lots were for the mutual benefit of all the purchasers of lots on the block; and that, although a previous purchaser from the owner of the block could not sue at law upon the covenant in the deed to a subsequent purchaser, the Court of Chancery might protect him by injunction against the carrying on of any noxious business or trade upon the lot of such subsequent purchaser.

The plaintiff Maxwell, in the principal case, bought two of the lots on St. Mark's Place, on which first-class dwelling-houses had been erected by Davis, according to the map or plan of St. Mark's Place, made and exhibited by him (the houses being set back eight feet from the street), on the 13th day of January, 1832, that being the date of Maxwell's deed. The facts found by the judge at Special Term, and the facts admitted by the pleadings, show that these lots were bought by Maxwell upon the assurance or agreement of Davis that all the houses on the Place, as shown on the map, were to be set back eight feet from the street, leaving the open space between the houses seventy-six feet in width.

The judge at Special Term found that on the 11th of October, 1832, Davis conveyed to Moses Henriques two lots on Third Avenue, at the northeast corner of Third Avenue and Eighth Street (the strip of land

of eight feet in width, which it was the object of this suit to restrain the defendant from building on, being a part of the northeast corner lot), and a lot on Eighth Street, next easterly of the corner lots; that this deed was in the nature of a mortgage to secure the firm of Josephs & Co., of which Henriques was a member, for money loaned by the firm to Davis, Davis still retaining the right to dispose of the property, accounting to them for the same when sold; that on the 13th of February, 1883, Davis negotiated a sale of these lots to Edmund Wilkes, who on that day received a deed from Henriques and wife for the lots; that at the time Davis sold these lots to Wilkes, he showed Wilkes the diagram of the Place, and declared his intention to set the building back eight feet from the original line of the street; that when Wilkes built the corner building now owned by the defendant, and also two other houses east of it, he erected them all on the line designated by Davis, and in conformity with the line of the other buildings previously erected by Davis on that street, carrying out the plan which Davis had previously formed of making St. Mark's Place a uniform street or Place of seventy-six feet in width.

The defendant holds through several mesne conveyances from Wilkes. The defendant bought with notice that it was claimed that there were restrictions which would prevent the defendant from acquiring a right, as purchaser of the lots, to build upon the eight feet described as a court-yard. The uniformity of the position of all the houses on St. Mark's Place was probably sufficient alone to put the defendant on inquiry.

It is probable that the equity arising from the circumstances and assurances under which the lots were sold and conveyed by Davis, was mutual, as between him and his grantees respectively; and hence, that it would be easy to show that the equity was mutual as between his grantees, without regard to priority of conveyances, so that the equity would or might exist in favor of a subsequent grantee against a prior grantee, as well as in favor of a prior grantee against a subsequent grantee; but it is unnecessary in this case to examine or decide that question.

The judgment of the Superior Court should be affirmed, with costs, on the ground of the equity in favor of the plaintiffs, as prior grantees, arising from the circumstances and assurances under which they took their conveyances and paid their money; which equity attaches to the remaining lots, and can and ought to be enforced against the defendant, taking with notice, or under circumstances equivalent to notice, of the equity in favor of the plaintiffs.

SELDEN, J., did not sit in the case; all the other judges concurring.

Judgment affirmed.

WINFIELD v. HENNING.

NEW JERSEY COURT OF CHANCERY. 1870.

[Reported 6 C. E. Green, 188.]

ON motion to dissolve injunction, upon bill and answer.

Mr. Dixon, in support of the motion.

Mr. Ransom, contra.

THE CHANCELLOR. The complainant owns a house and lot on the south side of South Fifth Street, formerly called also Gilbert Street, in Jersey City. The defendant owns a house and lot adjoining it on the west, and on the corner of South Fifth Street and Coles Street. These lots are part of a tract of one hundred feet square, at the southeast corner of Coles Street and South Fifth Street, which was conveyed by the devisees of John B. Coles to Keeney and Wheeler, on the first of May, 1854. In the deed the premises were designated by numbers, as four lots fronting on South Fifth or Gilbert Street, and the deed contained this provision: "It being expressly understood and agreed that the houses which may be erected on Gilbert Street shall be set back ten feet from the southerly line of said street."

In May, 1857, Keeney conveyed his interest in this tract to Wheeler, who afterwards erected on it five two-story houses of twenty-foot front on South Fifth Street, ten feet from the south line of the street.

After they were built, in May, 1858, he conveyed the house and lot of the complainant to a grantee, through whom the complainant derives title; and one year after this he conveyed the house and lot of the defendant to a grantee, through whom the defendant claims title. The stipulation as to the placing houses ten feet from the street, is not contained in any deed after that to Keeney and Wheeler. The grantors in that deed owned a large number of lots in the vicinity, some of which were on the opposite side of the street, and retained them after the deed to Keeney and Wheeler. The defendant, in May, 1870, commenced erecting an addition to the dwelling-house on his lot, which would occupy the ten feet between it and the street, by which the westerly view or prospect from the front of the complainant's house is cut off. The injunction restrains the defendant from proceeding with or completing that building.

The two questions in the case are, whether the defendant is bound by the stipulation or covenant in the deed from the Coles family, and if he is, whether the complainant has any right to compel its performance.

The provision or covenant in the deed is not like that in *Spencer's Case*, 5 Rep. 16, as was urged on the argument. It does not relate to something collateral to the land, but to the land conveyed itself.

In that case the covenant was to erect a brick wall on an adjoining lot. Nor does it relate to a thing not *in esse*, as a wall to be built; but it relates to the ten feet of the tract next to the street, and the negative stipulation not to erect houses on that is, in its legal effect, to keep it free from buildings; this is the only legal effect of the covenant; it does not oblige the grantees or their assigns to erect buildings at that distance, or to erect any houses at all.

The stipulation names no one as bound, neither the grantees, their heirs or assigns, but it is annexed to the land and the grant of it, and must therefore be co extensive with the estate granted, which is to them; their heirs and assigns. In a suit by the grantors there would be no question but that this stipulation would be enforced against any owner of this tract, or any part of it, who derived his title through this deed.

The question whether the complainant is entitled to enforce this stipulation, is not so clear. If any purchaser of the other lots retained by the Coles family at the giving of this deed, and injured by this erection, was the complainant, the authorities are numerous and decided that he would be entitled to the benefit of this stipulation. *Tulk v. Moxhay*, 11 Beav. 571; s. c. 2 Phil. 774; *Barron v. Richard*, 8 Edw. Ch. 96; *Hills v. Miller*, 3 Paige, 254.

But in this case both parties derive title from the covenants, and not from the covenantee; and the question is, whether they are bound to each other by the covenants which Wheeler entered into with the Coles family, for the benefit of the property which they retained. An action at law could not be maintained by the complainant against the defendant on such covenant. But in equity their position is different. Both parties are bound to the grantors in the Coles deed to keep this front free from buildings; each is subject to the easement over his lot, in favor of those subsequently deriving title from Coles, and each is equitably and justly entitled to the advantage which the observance of this stipulation by his neighbor may be to him. If all were relieved from the incumbrance, none perhaps could complain. But to be restrained from extending his own building to the street, and to have his neighbor on each side project in front of him, would be a much greater grievance to any of these lot owners than was contained in the stipulation in the deed through which he derived title; and he has no power to compel the grantors to enforce the covenant. It seems equitable that this court should, at his instance, compel the observance of this covenant. This view is supported by the *dictum* of Lord Romilly in a case heard before him at the Rolls, in 1866, *Western v. Macdermott*, 1 Eq. Cas. L. R. 507; and by a decision of the Supreme Court of Rhode Island, *Greene v. Creighton*, 7 R. I. 1.

This easement was in existence at the time of the conveyance of the complainant's lot by Wheeler, who still retained the lot of the defendant, which was the dominant tenement; and this space being

left open in compliance with a covenant or stipulation binding on both lots, it might be held to be an apparent and continuous easement, to which the part retained was thus made subject.

*The motion to dissolve must be denied.*¹

SHARP v. ROPES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1872.

[Reported 110 Mass. 381.]

BILL in equity, filed July 10, 1872, alleging that Stephen Heath in 1865, being the owner of a parcel of land on a way, now called Gordon Street, in West Roxbury, laid it out in lots; that he conveyed lot 8 and part of lot 7 to George G. Drew, by deeds containing the following provision: "That for the term of fifteen years from the first day of January, 1866, no building shall be erected or placed on said land, the main part of which shall come within twenty feet of said street or way; and the main part of any such building shall not be less than two stories high, exclusive of basement and attic; and that no trade or manufacture injurious or offensive to dwelling-houses, or their occupants in that neighborhood, shall be carried on, and no livery stable or swine shall be kept on said land during said time. A violation of either of said restrictions shall not make a forfeiture of the estate, but in case of any such violation said Heath, his heirs or devisees, may enter upon said land, and abate or remove, forcibly if necessary, anything erected, placed or kept therein, in violation of said restrictions, and at the expense of the guilty party;" that the land has since been conveyed to the plaintiff by deeds containing the same provision; that after the conveyance to Drew, Heath conveyed lot 6 and the rest of lot 7 to the defendant, by deeds containing the same provision; and that the defendant knew that the restrictions were for the benefit of all the lots; but that he was nevertheless proceeding to erect a building on lot 6 within twenty feet of Gordon Street. The prayer was that he might be restrained from so doing. The case was reserved by Gray, J., for the determination of the full court, on the pleadings and an agreed statement of facts, substantially as follows:—

In 1865 Stephen Heath, a house-builder, being the owner of a parcel of land in West Roxbury, laid it out in lots for building purposes, according to a plan, dated March 25, 1865, and recorded in the registry of deeds for the county, and the material part of which is copied in the margin (page 435). The way, thirty feet wide, laid down on the plan, is now a public highway, called Gordon Street.

By deed dated December 23, 1865, and recorded March 1, 1866,

¹ But see *King v. Dickeson*, 40 Ch. D. 596.

Heath conveyed to George G. Drew lot 8, and by deed dated June 27, 1866, and recorded July 12, 1866, he conveyed to him a strip of lot 7, adjacent to lot 8. Both these deeds contained the provision set out in the bill. Drew immediately built a house upon the land conveyed to him, and the land has since been conveyed to the plaintiff by deeds containing the same provision. Before the deeds to Drew, Heath erected on lot 10 a dwelling-house, no part of which was within twenty feet of the way, and of this house he remained the owner until his death; but he lived a mile distant.

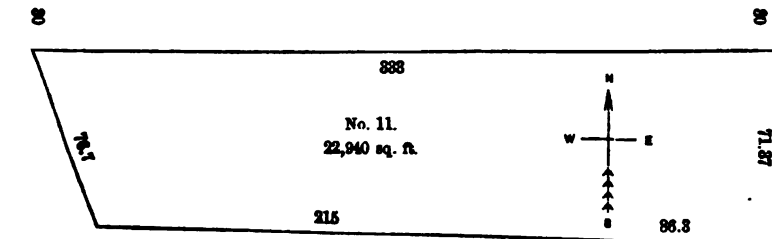
By deed dated June 27, 1866, and recorded September 7, 1866, Heath conveyed to the defendant the rest of lot 7 and the northern part of lot 6; and by deed dated February 27, 1867, and recorded March 11, 1867, he conveyed to the defendant the southern part of lot 6. Both these deeds contained the same provision as the deeds to Drew.

In all the deeds to Drew and the defendant, the granted premises were described by reference to the plan on record.

By deed dated March 27, 1865, Heath had conveyed lot 11 by a deed containing no restrictions whatever. He conveyed lots 3 and 4 by deeds dated respectively November 1, 1865, and January 1, 1867, and lots 1 and 2 by deed dated April 1, 1868, all these deeds containing the same provision as the deeds to Drew and the defendant, except that the buildings, instead of being required not to come within twenty feet of

GREEN STREET.

	77	60	50	50	87	
	No. 1.	No. 2.	No. 3.	No. 4.	No. 5.	
76.15	7267 sq. ft.	5180 sq. ft.	4800 sq. ft.	4300 sq. ft.	7314 sq. ft.	86.1
	82.5	60	50	50	91.1	
	No. 10.	No. 9.	No. 8.	No. 7.	No. 6.	
86.55	6988 sq. ft.	5184 sq. ft.	4320 sq. ft.	4320 sq. ft.	8048 sq. ft.	86.5
	78	60	50	50	96.2	



Gordon Street, were required not to come within fifteen feet of Green Street; and he conveyed lot 5 by a deed dated May 27, 1867, containing no provision as to the distance from Green Street within which a building might not be erected. In 1868 Heath died, leaving a will, by which he devised lots 9 and 10 to his widow, Susan B. Heath, who was his executrix, and who, with her family, has lived in the house on lot 10 for two years.

The defendant was proceeding to erect a large building on the southern part of lot 6, within four feet of Gordon Street. The plaintiff asked Susan B. Heath to prevent the erection of the building, but she refused, and verbally consented to its erection.

If it is competent evidence, it was agreed to be a fact that when the defendant took his deed of February 27, 1867, he had no knowledge that there was any restriction in any deed from Heath to any one else; and that Heath stated to him "that he would waive the restriction if he insisted upon it, that he did not consider it amounted to much, that the property would have to be used for shops in a short time, and that the defendant would not be troubled if he built a shop next to Gordon Street." The case was submitted on briefs.

R. Olney, for the plaintiff.

T. P. Proctor, *W. W. Warren*, and *H. R. Brigham*, for the defendant.

AMES, J. The case finds that Stephen Heath, being the owner of the entire tract of land, caused it to be laid out in eleven separate building lots. A plan, showing the streets that were to be opened, and the different lots, with their respective dimensions, areas and numbers, was duly recorded in the registry of deeds; but this plan furnishes no intimation of an intention on the part of the grantor to impose any restriction whatever upon purchasers, in regard to the manner in which they were to occupy or build upon the lots which they should purchase. Of the five lots upon the northerly side of Gordon Street, lot 10 was built upon by the grantor himself, he having erected a dwelling-house thereon, which has been occupied by his family since his decease. Lot 8 and a portion of lot 7 were sold and conveyed by him to George G. Drew, and have since been conveyed to the plaintiff. The remainder of lot 7 and the whole of lot 6 were conveyed to the defendant. Thus, of the five lots lying on the northerly side of that street, three were conveyed by said Heath to two separate purchasers, subject to the conditions and restrictions recited in the plaintiff's bill. There is no suggestion that the other two lots were subjected to any restriction of the kind.

It is not claimed that, in regard to any of the lots, there was any written covenant by the grantor, and it does not appear that there was any express stipulation or direct assurance on his part, that any person who should purchase a lot on the north side of that street should have the benefit of a restriction binding all the other purchasers to leave an open space between their dwelling-houses and the street. The

only ground upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building, by which each one would acquire a right in the nature of an easement in the land purchased by the others, is to be found in the fact, that in his transactions with two separate and independent purchasers, the grantor conveyed a portion of the land in each case, subject to the terms and conditions set forth in the bill of complaint. It is true that, of these conditions, the one prohibiting the prosecution of any offensive trade or manufacture upon the premises, or the using of them for the keeping of swine, or of a livery stable, would in practice be beneficial to the neighborhood generally. But it is to be remembered that the grantor had himself built a dwelling-house in that immediate neighborhood, and the provision which he made for the prevention of nuisances may have been intended for the benefit of that particular house.

It is undoubtedly true, and has often been decided, that where a tract of land is subdivided into lots, and those lots are conveyed to separate purchasers, subject to conditions that are of a nature to operate as inducements to the purchase, and to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other grantee. *Whitney v. Union Railway Co.*, 11 Gray, 359; *Parker v. Nightingale*, 6 Allen, 341; *Linzee v. Mixer*, 101 Mass. 512; *Tulk v. Moxhay*, 2 Phil. Ch. 774. But in the case at bar there is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed points out the mode in which he, his heirs or devisees, may enforce it. Neither of the deeds, under which these parties respectively claim, purports to give to the grantee any such right against any other grantee. For ought that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continue to own the dwelling-house. The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained.

The cases cited and relied upon by the plaintiff's counsel do not appear to us to meet this difficulty. In *Tallmadge v. East River Bank*, 26 N. Y. 105, a landowner in New York city had laid out a street sixty feet in width, and had sold the building lots on each side, making use in the sales of a plan which showed that an open space was to be reserved in front of each lot. The purchasers bought under this plan, and with the express assurance that it should be adhered to, and their right to enjoy the promised advantages was sustained by the court. In

Hills v. Miller, 3 Paige, 254, the owner had sold a tract of land, giving at the same time a bond that a smaller triangular lot belonging to him, in front of the lot sold, should not be occupied with buildings. The court held that the deed and the bond constituted one contract, and created an easement which could be enforced against any purchaser of the triangular lot, with notice. In *Barrow v. Richard*, 8 Paige, 351, an estate had been subdivided into a large number of building lots, which the owner had conveyed by deeds to various purchasers, with express covenants against all trades, &c., offensive to "the neighboring inhabitants." The English cases also cited, *Child v. Douglas*, Kay, 560, *Coles v. Sims*, 5 De G. M. & G. 1, and *Western v. Macdermott*, L. R. 2 Ch. 72, are all of them cases in which a general building plan, or uniform system and mode of occupation, had been distinctly established and made a part of the title conveyed, in express terms, either by the deed itself, or by some covenant or obligation connected with it by reference. But we find nothing in the terms of the conveyance, or in any reference to a plan or covenant, or in the circumstances of the transaction, or the situation of the property, that will justify us in saying that any such general plan or system was intended by the grantor to be established for the benefit of grantees, or to make a part of their respective titles. The case in our judgment is closely analogous to *Badger v. Boardman*, 16 Gray, 559; *Jewell v. Lee*, 14 Allen, 145; *Hubbell v. Warren*, 8 Allen, 178, 178, and is disposed of according to the law decided in these cases, by an order that the

*Bill be dismissed, with costs.*¹

PECK v. CONWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1876.

[Reported 119 Mass. 546.]

BILL in equity, by the owner of lot A, shown on the plan printed in the margin of page 439, to restrain the defendants, the owners of lots B and C, from building on lot B.

The case was reserved by *Colt, J.*, upon the pleadings and the report of a master, for the consideration of the full court, and was as follows: —

¹ For other cases in which the court found no general plan or circumstances showing that the restriction was intended to benefit other lands, see *Badger v. Boardman*, 16 Gray, 559; *Dana v. Wentworth*, 111 Mass. 291; *Skinner v. Shepard*, 130 Mass. 180; *Lowell Institution for Savings v. Lowell*, 153 Mass. 530; *Hamlen v. Keith*, 171 Mass. 77; *Clapp v. Wilder*, 176 Mass. 332 (3 JJ. dissenting); *Clark v. McGee*, 159 Ill. 518 (see *Collins v. Castle*, 36 Ch. D. 243, 253); *Summers v. Beeler*, 90 Md. 474; *Safe Deposit Co. v. Flaherty*, 91 Md. 489; *Tibbetts v. Tibbetts*, 66 N. H. 360; *Mulligan v. Jordan*, 50 N. J. Eq. 363; *Equitable Life Assur. Society v. Brennan*, 148 N. Y. 661; *Hutchinson v. Thomas*, 190 Pa. 242.

Richard Ensign, on February 14, 1848, being the owner of lots A and B, and occupying lot A as a homestead, conveyed lot B, in fee simple, with general covenants of warranty, to Joseph B. Huggins, who was then the owner of lot C. The deed described the land by metes and bounds, and following the description was this clause: "With this express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed."

The defendants purchased lots B and C in 1874. Of the deeds in the chain of title from Huggins, which were all duly recorded before the defendants purchased, some mentioned or referred to the reservation in Ensign's deed, but the deed to the defendants, which contained full covenants of warranty, made no mention of it or reference to former deeds. The defendants made no examination of the records before their purchase, and had no actual knowledge of the reservation.

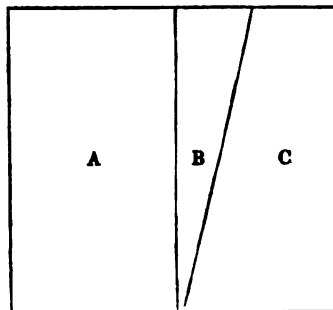
The plaintiff purchased lot A of Richard Ensign by deed dated April 13, and recorded April 14, 1848. This deed made no mention of privileges or appurtenances, or of the reservation in the deed to Huggins. The defendants purchased their land, paying therefor its full market value, free of incumbrances, for the purpose of building thereon. The plaintiff notified them of the restriction before they commenced building, and forbade them so to do, and, upon their proceeding to build upon the land, brought this bill.

The master found that the greater part of the proposed building would stand upon lot B; that it would not obstruct the view from the front rooms in the plaintiff's house, and only partially obstruct the view from the rooms in the rear part of the house; and that its erection would be no appreciable damage or injury to the plaintiff's premises.

A. J. Waterman, for the plaintiff.

J. Dewey, Jr., for the defendants.

MORRIS, J. Both parties derive title from Richard Ensign. The deed of said Ensign, under which, through various mesne conveyances, the defendants derive their title, conveys to Joseph B. Huggins a triangular piece of land adjoining the lot now owned by the plaintiff, "with this express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed." En-



sign, being owner of the fee, had the right to sell his land subject to such reservations or restrictions as to its future use and enjoyment as he saw fit to impose, provided they were not contrary to public policy. The restriction in this deed, that no building should be erected upon the land conveyed, was one which he had a right to make, and there is no room for doubt, that, if a building was erected in violation of this restriction, Ensign, as long as he lived and remained the owner of the adjoining land, would be entitled to relief in equity to enforce the restriction. *Parker v. Nightingale*, 6 Allen, 341; *Whitney v. Union Railway*, 11 Gray, 359; *Badger v. Boardman*, 16 Gray, 559.

The only question in the case is whether the plaintiff, who is the grantee of said Ensign, is entitled to the same remedy.

The reservation creates an easement, or servitude in the nature of an easement, upon the land conveyed. If this easement was created for the benefit of the adjoining lot, of which the grantor in the deed remained the owner, and not for the personal convenience of the grantor, and was intended to be annexed to such lot, it would be appurtenant thereto, and would pass to a grantee thereof.

The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.

In this case, the triangular piece of land affected by the easement was a part of a large lot owned by Ensign. He retained the remainder of the large lot for his homestead. There is no suggestion that he had other land in the vicinity, which could be benefited by the restriction. It is difficult to see how he would have any interest in restricting the use of the land sold, except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect; this is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right in Ensign, but was an easement appurtenant to the estate which he conveyed to the plaintiff. *Dennis v. Wilson*, 107 Mass. 591; *Stearns v. Mullen*, 4 Gray, 151. It follows that the plaintiff is entitled to the relief which she seeks.

The fact that the defendants, when they took their deed, had not actual knowledge of this reservation, is immaterial. They derive their title under the deed which contains it, and have constructive notice of the provisions of the deed. *Whitney v. Union Railway*, *ubi supra*. Nor can the fact found by the master, that the erection of the building contemplated by the defendants "would be no appreciable damage or injury to the plaintiff's premises" affect the rights of the parties. Such

an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived because in the judgment of others it is of little or no damage.

Decree for the plaintiff.¹

¹ For other cases in which it was held sufficiently to appear that a restriction placed on land was for the benefit of adjoining land, see *Parker v. Nightingale*, 6 Allen, 341; *Jeffries v. Jeffries*, 117 Mass. 184; *Tobey v. Moore*, 130 Mass. 448; *Hopkins v. Smith*, 162 Mass. 444; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Clark v. Martin*, 49 Pa. 289; *Muzzarelli v. Hulshizer*, 163 Pa. 648; *Landell v. Hamilton*, 175 Pa. 327; *Electric City Land Co. v. West Ridge Coal Co.*, 187 Pa. 500.

"The right of the owner of a lot of land to enforce a covenant, restrictive of the use of another tract, which covenant has been entered into by an owner of such other tract with the former owner of both, but has not been expressly assigned, depends primarily on the covenant having been made for the benefit of land embracing said lot. If it has been so made the benefit of the covenant enures to subsequent purchasers of the land.

"While, under the operation of this rule, a subsequent purchaser, or his assigns, might enforce the restriction of a common covenant against a prior purchaser, or his assigns, it is evident that it gives no right of action to a prior against a subsequent purchaser. Some other reason must exist for that class of cases which hold that purchasers and their assigns are entitled to enforce, between themselves, a restrictive covenant entered into by first purchasers with a common vendor, without reference to priorities of title. Vice-Chancellor W. PAGE WOOD, in *Child v. Douglass*, 2 Jur. (N. S.) 950, 952, says: 'I have not been able to come to a conclusion, perfectly satisfactory to my own mind, what are the rights of parties, *inter se*, each of whom has covenanted with the landlord, but who have not covenanted with each other, nor taken any covenant from the landlord to themselves.'

"The class of cases in which equity has given such relief embraces those involving restrictive covenants, entered into with the original owner, or owners, of a tract, in pursuance of a general plan for the development and improvement of the property, by laying it out in streets, avenues and lots, adopting some uniform or settled building scheme, regulating the number, location, size or style of houses, or the uses to which the buildings or property may be put.

"The action is held not to be maintainable between purchasers not parties to the original covenants, in cases in which —

(1) It does not appear that the covenant was entered into to carry out some general scheme or plan for the improvement or development of the property which the act of the defendant disregards in some particular.

(2) It does not appear that the covenant was entered into for the benefit of the land of which the complainant has become the owner.

(3) It appears that the covenant was not entered into for the benefit of subsequent purchasers, but only for the benefit of the original covenantee and his next of kin.

(4) It appears that the covenant has not entered into the consideration of the complainant's purchase.

(5) It appears that the original plan has been abandoned without dissent, or the character of the neighborhood has so changed as to defeat the purpose of the covenant, and to thus render its enforcement unreasonable. . . .

"The equity would seem to spring from the presumption that each purchaser has paid an enhanced price for his property, relying on the general plan, by which all the property is to be subjected to the restricted use, being carried out, and that while he is bound by and observes the covenant, it would be inequitable to him to allow any other owner of lands, subject to the same restrictions, to violate it. . . .

"The law, deducible from these principles and the authorities, applicable to this case, is, that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues and lots, and contemplating a restriction as

NORCROSS v. JAMES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[Reported 140 Mass. 188.]

HOLMES, J. One Kibbe conveyed to one Flynt a valuable quarry in Longmeadow, of six acres, bounded by other land of the grantor, with covenants as follows: "And I do for myself, my heirs, executors, and administrators, covenant with the said Flynt, his heirs and assigns, that I am lawfully seised in fee of the afore-granted premises, that they are free of all incumbrances, that I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm or premises in said Longmeadow." By mesne conveyances the plaintiffs have become possessed of the quarry conveyed to Flynt, and the defendants of the surrounding land referred to in the covenant. The defendants are quarrying stone in their land, like that quarried by the plaintiffs; and the plaintiffs bring this bill in equity for an injunction.

The discussion of the question under what circumstances a landowner is entitled to rights created by way of covenant with a former owner of the land, has been much confused since the time of Lord Coke, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the estate in the land, and those which are said to be attached to the land itself: "So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land." *Chudleigh's Case*, 1 Rep. 120 a, 122 b; s. c. nom. *Dillon v. Frains*, Poph. 70, 71.

Rights of the class represented by the ancient warranty, and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question how an assignee could sue upon a contract to which he was not a party. West, Symboleog. I. sect. 35. *Wingate's Maxima*, 44, pl. 20, 55, pl. 10. Co. Lit. 117 a. *Finch's Case*, 4 Inst. 85. But an heir could sue upon a warranty to his ancestor, because for that purpose he was *eodem persona cum antecessore*. See

to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan; one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase.

"The right of action from this would seem to be dependent as much on the fact of the general scheme as on the covenant." GREEN, V. C., in *De Gray v. Manmouth Beach Club House Co.*, 50 N. J. Eq. 329, 335, 339, 340 (1892). Cf. *Nalder v. Harman*, 83 L. T. R. 257 (C. A., 1900).

Y. B. 20 & 21 Ed. I. 232 (Rolls ed.); *Overton v. Sydall*, Poph. 120, 121; *Oates v. Frith*, Hob. 330; *Bain v. Cooper*, 1 Dowl. Pr. Cas. (N. S.) 11, 14. And this conception was gradually extended, in a qualified way, to assigns, where they were mentioned in the deed. Bract. fol. 17 b, 67 a, 380 b, 381. Fleta, III. c. 14, § 6. 1 Britton, (Nich. ed.) 255, 256. Y. B. 20 Ed. I. 232-234 (Rolls ed.). Fitz. Abr. Covenant, pl. 28. Vin. Abr. Voucher, N, p. 59. Y. B. 14 Hen. IV. 56; 20 Hen. VI. 34 b. Old Natura Brevium, Covenant, 67, B, C, in Rastell's Law Tracts, ed. 1534. Doct. & Stud. Dial. 1, c. 8. F. N. B. 145, C. Co. Lit. 384, b. Com. Dig. Covenant, B, 8. *Middlemore v. Goodale*, Cro. Car. 503; s. c. Ib. 505; W. Jones, 406; *Philpot v. Hoare*, 2 Atk. 219.

But in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same status or inheritance, and thus the same *persona*, *quoad* the contract. The privity of estate which is thus required is privity of estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books. See, further, Y. B. 21 & 22 Ed. I. 148 (Rolls ed.); 14 Hen. VIII. 4, pl. 5. Of course we are not now speaking of cases of landlord and tenant, and it will be seen that the doctrine has no necessary connection with tenure. F. N. B. 134, E. We may add, that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir, as representing the person of his ancestor. Y. B. 32 & 33 Ed. I. 516 (Rolls ed.).

On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant, or covenant, when once acquired were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseisor. "So a disseisor, abator, intruder, or the lord by escheat, &c., shall have them as things annexed to the land." *Chudleigh's Case*, *ubi supra*. See 1 Britton, (Nich. ed.) 361; Keilw. 145, 146, pl. 15; F. N. B. 180, N; *Nevil's Case*, Plowd. 377, 381. In like manner, when, as was usual, although not invariable, the duty was regarded as falling upon land, the burden of the covenant, or grant, went with the servient land into all hands, and of course there was no need to mention assigns. See cases *supra et infra*. The phrase consecrated to cases where privity was not necessary was *transit terra cum onere*. Bract. fol. 382 a, b. Fleta, VI. c. 23, § 17. See Y. B. 20 Ed. I. 360 (Rolls ed.); Keilw. 113, pl. 45. And it was said that "a covenant which runs and rests with the land lies for or against the assignee at the common law, *quia transit terra cum onere*, although the assignee be not named in the covenant." *Hyde v. Dean of Windsor*, Cro. Eliz. 552; s. c. Ib. 457; 5 Rep. 24 a; Moore, 399.

It is not necessary to consider whether possession of the land alone would have been sufficient to maintain the action of covenant: it is

enough for our present purposes that it carried the right of property. Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class from pure matters of contract, by reason of their having embraced active duties as well as those purely passive and negative ones which are plainly interests carved out of a servient estate and matters of grant. The most conspicuous example is *Pakenham's Case*, Y. B. 42 Ed. III. 3, pl. 14, where the plaintiff recovered in covenant as terre-tenant, although not heir, upon a covenant or prescriptive duty, to sing in the chapel of his manor. *Spencer's Case*, 5 Rep. 16 a, 17 b. Another, which has been recognized in this Commonwealth, is the *quasi* easement to have fences maintained. *Bronson v. Coffin*, 108 Mass. 175, 185; s. c. 118 Mass. 156. Repairs were dealt with on the same footing: they were likened to estovers and other rights of common. 5 Rep. 24 a, b. *Hyde v. Dean of Windsor*, *ubi supra*. See F. N. B. 127; *Spencer's Case*, *ubi supra*; *Eiore v. Strickland*, Cro. Jac. 240; *Brett v. Cumberland*, 1 Roll. R. 359, 360; and other examples might be given. See Bract. 382 a, b; Fleta, VI. c. 23, § 17; Y. B. 20 Ed. I. 360; Keilw. 2 a, pl. 2; Y. B. 6 Hen. VII. 14 b, pl. 2; Co. Lit. 384 b, 385 a; *Cockson v. Cock*, Cro. Jac. 125; *Bush v. Cole*, 12 Mod. 24; s. c. 1 Salk. 196; 1 Show. 388; Carth. 232; *Sale v. Kitchingham*, 10 Mod. 158. The cases are generally landlord and tenant cases, but that fact has nothing to do with the principles laid down.

When it is said that in this class of cases there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or *quasi* easement, or must be in aid of such a grant (*Bronson v. Coffin*, *ubi supra*); which is generally true, although, as has been shown, not invariably (*Pakenham's Case*, *ubi supra*); and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression "privity of estate" in this sense is of modern use, and has been carried over from the cases of warranty, where it was used with a wholly different meaning.

In the main, the line between the two classes of cases distinguished by Lord Coke is sufficiently clear; and it is enough to say, that the present covenant falls into the second class if either. Notwithstanding its place among the covenants for title, it purports to create a pure negative restriction on the use of land, and, for the moment, we will take it as intended to do so for the benefit of the land conveyed.

The restriction is, in form, within the equitable doctrine of notice. *Whitney v. Union Railway*, 11 Gray, 359; *Parker v. Nightingale*, 6 Allen, 341; *Beals v. Case*, 138 Mass. 138. See *Austerberry v. Oldham*, 29 Ch. D. 750; *London & Southwestern Railway v. Gomm*, 29 Ch. D. 562; *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403; *Tulk v. Moxhay*, 2 Phillips, 774. But, as the deed was recorded, it does not matter whether the plaintiff's case is discussed on

this footing, or on that of easement, if there is any difference so far as the present point is concerned.

The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must "touch or concern," or "extend to the support of the thing" conveyed. 5 Rep. 16 a, 24 b. They must be "for the benefit of the estate." *Cockson v. Cock*, *ubi supra*. Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden. *Keppell v. Bailey*, 2 Myl. & K. 517, 585; *Ackroyd v. Smith*, 10 C. B. 164; *Hill v. Tupper*, 2 H. & C. 121.

The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon, such as was recognized in *Brooks v. Reynolds*, 106 Mass. 31, and an easement to have a quarry left unopened, the answer is, that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly, — an easement not to be competed with, — and in that interest alone a right to prohibit an owner from exercising the usual incidents of property. It is true that a man could accomplish the same results by buying the whole land, and regulating production. But it does not follow, because you can do a thing in one way, that you can do it in all; and we think that, if this covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it should be treated as merely personal in its burden. Whether the latter is its true construction, as well as its only legal operation, and whether, so con-

strued, it is or is not valid, are matters on which we express no opinion. See further *Brewer v. Marshall*, 4 C. E. Green, 537; *Taylor v. Owen*, 2 Blackf. 301; *Thomas v. Hayward*, L. R. 4 Ex. 311.

*Bill dismissed.*¹

J. G. Dunning, for the plaintiff.

C. L. Long, for the defendant.

WHITTENTON MANUFACTURING COMPANY v. STAPLES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1895.

[Reported 164 Mass. 319.]

BILL in equity, filed in the Superior Court on February 15, 1894, by the owner of a mill on Mill River in Taunton, against another mill-owner on the same river, to recover one fifth of the sums paid by the plaintiff for flowage damages caused by the reservoir dam above the mills, and for repairs upon the dam, and also one fifth of the compensation for drawing the water from the reservoir. The case was submitted upon an agreed statement of facts, on which the Superior Court ordered that the bill be dismissed; and the plaintiff appealed to this court. The facts appear in the opinion.

The case was argued at the bar in October, 1894, and afterwards was submitted on the briefs to all the judges.

A. M. Alger, for the plaintiff.

G. E. Williams, for the defendant.

ALLEN, J. The parties have agreed upon all the facts deemed to be material.

The Taunton Manufacturing Company built the reservoir dam on land owned by it in 1832, at a time when it was the owner of five mill privileges on the stream below, all of which were then in operation. This dam was for the sole use of the mills upon said mill privileges, and was essential to the reasonable enjoyment of all of the water powers, as the natural flow of the stream during much of the year would be inadequate for furnishing power.

Under this state of things, the corporation in the first place, on August 12, 1833, conveyed to the Bristol Print Works Company the two lowest mills, the land being described by metes and bounds, "together with all the buildings thereon, and all the rights, privileges, easements, and appurtenances to the said land in any wise appertain-

¹ And so *Taylor v. Owen*, 2 Blackf. 301; *Brewer v. Marshall*, 4 C. E. Green, 537; *Kettle River R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 471; *Tandy v. Creasy*, 81 Va. 553. Contra, *Hodge v. Sloan*, 107 N. Y. 244; *Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 171 Pa. 284. Cf. *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. R. 619.

ing or belonging, and all the streams and water rights and power thereof, also the dam and force of water."

On September 6, 1883, the corporation conveyed the next lowest mill to Charles Richmond, under whom, through mesne conveyances, the defendant claims. This deed conveyed the land and buildings, "and the water power, dam, and all the appurtenances and privileges thereto belonging;" and contained further provisions as follows: "First. This conveyance is made subject to the right and privilege granted by said Taunton Manufacturing Company to the Bristol Print Works Company, their successors and assigns, to draw water from a reservoir of said Taunton Manufacturing Company through the premises herein described and conveyed, and to enter on said premises for the purposes of relaying and repairing the aqueduct and pipes leading through the same. Secondly. The said Richmond, his heirs and assigns, grantees of these premises, shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one fifth part of all sums which they may be held or agree to pay for flowage or damages to the proprietors of any lands by reason of any dam made or which may be made by said Taunton Manufacturing Company, or their successors or assigns, of any part of the estate of the said Taunton Manufacturing Company upon any stream or waters flowing to their mills. . . . Fourthly. This conveyance is made subject to the reservations and privileges granted to the Bristol Print Works by the Taunton Manufacturing Company. Fifthly. . . . The said Taunton Manufacturing Company, intending hereby to alien and assign unto the said Charles Richmond, his heirs and assigns, all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, water power and privileges, and head and fall of water (excepting as above excepted) for the considerations above mentioned and set forth. To have and to hold the lands, buildings, waters, and works aforesaid, with all and singular, the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith, unto him the said Charles Richmond, his heirs and assigns forever, except as above excepted."

The defendant contends that the above deed conveyed no right in the reservoir, and that the clause requiring Richmond and his heirs and assigns to pay one fifth of the damages for flowing is not binding on subsequent owners; and these are the principal questions which have been argued in the case. It is not disputed that the title and rights of the Taunton Manufacturing Company to the upper mill and privilege have come through mesne conveyances to the plaintiff.

If the construction of a deed is doubtful, the practical construction put upon it by the parties and their successors may be looked at in connection with the deed itself, and the circumstances existing at the time of its execution. *Reynolds v. Boston Rubber Co.*, 160 Mass. 240, and cases there cited.

Until recently, the parties in interest have assumed, and have acted on the theory, that Richmond and his heirs and assigns had an interest in the additional water power created by the reservoir, and were bound to pay one fifth of the damages for flowing. This is shown by the following facts.

On July 15, 1835, the Taunton Manufacturing Company conveyed to James K. Mills and others the upper mill and privilege on the stream, "with the dams and water privileges thereon, together with all the right which said Taunton Manufacturing Company have to flow the land between the premises hereby conveyed and the bridge where the old road to Boston crosses Canoe River; the dams, water privileges, and rights of flowage hereby intended to be granted and reserved being fully set forth in, and subject to, an agreement by and between the grantor and grantees bearing even date with and to be referred to always as a part of these presents." The said agreement provided, amongst other things, as follows: "First. The reservoir dam at White's Bridge above Whittenton shall not be altered in any mode without the consent of the parties therein interested or a majority of them. Provided, however, that the proprietors of the Whittenton Mill shall always cause to be let down from said reservoir a quantity of water sufficient to propel the present machinery of the Hopewell Mills [the Hopewell Mills were next below the Whittenton Mill] until the water in said reservoir shall be drawn down to the level of the present Whittenton dam, and the proprietors of the Whittenton Mill shall be entitled to a fair compensation from all the parties interested in the said reservoir for the time and labor of drawing the water as aforesaid. Second. The water between said reservoir dam and Whittenton Mills shall be used hereafter as has been heretofore customary, that is to say, the Whittenton proprietors shall do no act to prevent the natural flow of water over their premises by raising their dam above its present height. . . . Fourth. The damages accruing from time to time for flowage shall be apportioned between the proprietors of the Whittenton Mills and the mills now and formerly belonging to the Taunton Manufacturing Company by the award of judicious persons," etc.

The defendant derived his title as follows. The title of Richmond passed to Galen Hicks, under the foreclosure of a mortgage dated October 4, 1833, in which reference was made to the deed of the Taunton Manufacturing Company to Richmond. On March 1, 1848, Hicks conveyed to Dean and Morse, with a similar reference; and they in like manner, on April 1, 1849, conveyed to the Dean Cotton and Machine Company, which in its turn, on November 28, 1874, conveyed to the Taunton Cotton and Machine Company the land and water privileges, "together with all the rights of flowage appurtenant to said estate, and all the right, title, and interest of the grantor in the Reservoir and Flowage Company [this company will be hereinafter described], and subject to all the liability on account of such rights, and in relation thereto reference may be made to an agreement between the Taunton

Manufacturing Company and James K. Mills and others, dated July 15, 1835, . . . and to the award," etc. On June 1, 1880, the Taunton Cotton and Machine Company conveyed the property to the Park Mills, a corporation, with this provision: "This conveyance shall also include whatsoever rights, title, and interest, with the liabilities thereon, said corporation has in the Taunton Reservoir and Flowage Company." On July 12, 1889, the Park Mills conveyed to Staples, the defendant, with a similar provision. On the same day, the Taunton Cotton and Machine Company also executed a deed of the same premises to the defendant, "together with all rights of flowage appurtenant to said estate, and all the right, title, and interest of the grantor in the Reservoir and Flowage Company, and subject to all the liabilities on account of such rights. And in relation thereto reference may be made to three papers, namely, 1st, an agreement between the Taunton Manufacturing Company and James K. Mills and others, dated July 15, 1835, . . . together with the award," etc.

The Reservoir and Flowage Company referred to in some of the above deeds was established as follows.

In 1852, the owners of the several mills, all being corporations associated together as a voluntary association under the name of the Taunton Reservoir and Flowage Company, "for the purpose of aiding in the supplying themselves with water by the reservoir dam," appointed Willard Lovering, one of the owners of the Whittenton Mills, their agent, from time to time, as the damages for flowing should become due, to collect their proportions thereof, and to pay the same to the owners of lands flowed. The annual damages for flowing were in the same year fixed by agreements at \$1,842.89, and have not since been changed. These damages are fair and reasonable. From that time to the present, Lovering (who died in 1875) and the successive owners of the Whittenton Mills have continued without objection, in behalf of the owners from time to time of the several mills, under the name of the Taunton Reservoir and Flowage Company, to collect from said mill-owners and to pay out said damages for flowing, and to repair the reservoir dam, and to draw water from the reservoir, and to collect from the several mill-owners their respective shares of the expense thereof. The defendant, however, without assenting thereto or dissenting therefrom, otherwise than is herein stated, refused from time to time as said charges accrued to pay any part thereof, on the ground that he had not used the water. Bills for the annual expense of maintaining the reservoir dam as rendered to the several mill-owners were usually made out under the general statement, "To Flowage," without setting forth items for repairs or for drawing the water; but sometimes the bills were itemized. In 1885, the reservoir dam having been injured by a freshet, it was repaired at an expense of \$812.12, and the owners of all of said mills paid their proportional shares of such expense.

From the time of the execution of the above agreement to the present,

the use of the reservoir dam, except as herein stated, has been in accordance with the terms of the agreement, and no person has objected thereto or made any claim inconsistent therewith; and all the mills, when operated, have had the enjoyment of the head of water created by said reservoir dam, and of the reserve waters thereby stored, and no person other than the owners from time to time has used the same or had any interest therein.

The water rights belonging to the two lower mill privileges have been legally extinguished by abandonment. The defendant's mill buildings are standing; the water-wheels are in position; but the dam at his mill was carried away by a flood a few months before the conveyance to him, and he has not operated the mill or used the water power, but he has not abandoned the same.

The defendant contends that the above agreement, whereby the Taunton Reservoir and Flowage Company was formed, was for a partnership, and was one which the corporations were not authorized to make, under the decision in *Whittenton Mills v. Upton*, 10 Gray, 582. We have no occasion to consider that question. This agreement is referred to for the purpose of showing the practical construction put upon the grant to Richmond, and for this purpose it may be looked at, whether valid or invalid. The right of the plaintiff to maintain the bill in equity does not depend upon that agreement.

The owners of the defendant's mill, from the time of the conveyance to Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one fifth of the damages for flowing caused by the reservoir dam, and one fifth of the expense of repairing the same, and one fifth of the compensation for drawing the water from the same, and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir, except that since steam came into general use steam power has also been employed. But since 1890 the defendant has refused to make such contribution.

The owners of the two lowest privileges contributed in like manner their proportion, as fixed by the award referred to, down to the time of the extinguishment of their water privileges; and the owners of the two upper privileges have also paid their respective proportions, according to the award.

Such being the facts, we come now to consider the question of the defendant's right and liability.

The reservoir would naturally be of some benefit to the lower mill privileges, without any express grant. But upon the construction of the deed to Richmond, taken by itself alone, and without reference to what followed, there would be strong reason for holding that some right, the extent of which is not defined, in the water power created by the reservoir dam was intended to be included in the grant. This water power was in actual use at the time of the grant, and was essential to the reasonable enjoyment of what was in terms granted. More-

over, the reference in the deed to the rights of the Bristol Print Works Company under the deed, then recent, of the grantor to that company, shows clearly that it was understood that some right in the water power created by the reservoir was included in that deed. The provision binding Richmond and his heirs and assigns to pay one fifth part of the damages caused by the flowing to some extent implies that a similar right was intended to be granted to Richmond and his heirs and assigns. The conveyance includes in broad terms "all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, water power and privileges, and head and fall of water," with all "the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith." It would seem, therefore, even upon the deed alone, when construed in view of the facts then existing, that some right in the power created by the reservoir dam was by implication included. The plaintiff has cited several cases to show that there is an implied grant of whatever within the grantor's power is necessary to the beneficial enjoyment of the thing granted; and others may be found collected in *Case v. Minot*, 158 Mass. 577, 585. In this respect, the deed to Richmond is not like the deeds which were under consideration in *Brace v. Yale*, 4 Allen, 393, and *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, cited by the defendant.

But this construction of the deed, if otherwise doubtful, is made very clear by the subsequent acts of the parties. The whole plan was to treat the reservoir as existing for the common benefit of all the mill privileges which have been mentioned. This is shown especially by the agreement in 1835, and by the voluntary association formed by the owners of the several mills in 1852, under the name of the Taunton Reservoir and Flowage Company. The deed of 1874, in the defendant's chain of title, refers to both of these. The two deeds to the defendant himself, in 1889, both contain a like reference. The action of all the defendant's predecessors in title, and of the owners of the other privileges, has from the beginning been in accordance with this view as to the title. We find nothing tending in any degree to show that any other view was ever taken, till after the defendant's purchase in 1889.

Looking therefore at the deed itself under which the defendant's title is derived, and at the subsequent acts of the parties in interest, we are of opinion that a right to have the use and benefit of the reservoir was included in the grant to Richmond and his heirs and assigns, and that such right has descended to the defendant. The extent of this right, and the manner of defining and enforcing it, we need not now consider.

The question then arises whether a court of equity should enforce against the present owner of the premises the stipulation in the deed that Richmond and his heirs and assigns should pay one fifth part of the sums paid for flowing or damages to the proprietors of lands above the reservoir dam.

In England, it seems to be the tendency of recent decisions to hold

that the burden of a covenant, unless possibly one which amounts to a grant, never at law runs with the land, except as between landlord and tenant; and that in equity the court will not as against assigns enforce covenants calling for the payment of money, but only covenants which are merely restrictive as to the use of land. *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403. *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750. *Clegg v. Hands*, 44 Ch. D. 503. Gale on Easements, (6th ed.) 61, 62. Goddard on Easements, (4th ed.) 24.

This doctrine has not usually been accepted in the United States. It has been held in many decisions, in this Commonwealth and elsewhere, that at law the burden of a covenant may run with the land. *Savage v. Mason*, 3 Cush. 500. *Bronson v. Coffin*, 108 Mass. 175. *Richardson v. Tobey*, 121 Mass. 457. *King v. Wight*, 155 Mass. 444. *Joy v. St. Louis*, 138 U. S. 1, 34. *Fitch v. Johnson*, 104 Ill. 111. *Hazlett v. Sinclair*, 76 Ind. 488. *Norfleet v. Cromwell*, 64 N. C. 1. *Pomeroy*, Eq. Jur. 1295. It has also often been held elsewhere that a provision like that contained in the deed to Richmond is itself a covenant binding upon the grantee and his heirs and assigns; that it will run with the land; that it is valid in law; and that the relief granted by a court of equity is not to be limited to those covenants which are merely restrictive, but will be extended to covenants to do positive acts involving the expenditure of money. *Burbank v. Pillsbury*, 48 N. H. 475. *Kellogg v. Robinson*, 6 Vt. 276. *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35. *Bowen v. Beck*, 94 N. Y. 86. *Finley v. Simpson*, 2 Zab. 311. *Sparkman v. Gove*, 15 Vroom, 252. *Mynard v. Moore*, 76 N. C. 158. *Georgia Southern Railroad v. Reeves*, 64 Ga. 492. *Conduitt v. Ross*, 102 Ind. 166. *Mazon v. Lane*, 102 Ind. 364. See also Rawle on Covenants, (5th ed.) § 272, n.

In this Commonwealth, however, it has been held that such a provision in a deed poll does not constitute a technical covenant. *Parish v. Whitney*, 3 Gray, 516. *Maine v. Cumston*, 98 Mass. 317. *Martin v. Drinan*, 128 Mass. 515, 516. In *Kennedy v. Owen*, 136 Mass. 199, 203, the court followed the earlier decisions in saying that such a provision is not technically a covenant running with the land, because the grantee sealed nothing; but that it is rather "a mere personal obligation, imposed upon and assumed by the grantee, and binding upon him and his legal representatives as an implied contract entered into with the grantor; . . . an obligation, which, if enforceable at all against purchasers, is to be enforced against them by a court of equity alone." That case did not call for the determination of the question whether such equitable remedy existed or not. The present case, however, raises that question.

An ordinary easement binding the granted premises may be created in favor of the grantor, his heirs and assigns, by words contained in a deed poll. *Atkins v. Bordman*, 2 Met. 457, 462. *Bowen v. Conner*, 6 Cush. 132, 135. The grantee's acceptance of the deed subjects the granted estate, both in his own hands and in the hands of all others

who may come in under him, to the easement reserved. And we see no good reason why, under circumstances like those existing in the present case, an easement or servitude calling for the performance of positive acts may not also be created in like manner. This seems to be implied by the language of the court in *Dyer v. Sanford*, 9 Met. 395, 405. See also *Maine v. Cumston*, 98 Mass. 317; *Schworer v. Boylston Market Association*, 99 Mass. 285, 297, 298; *Woburn v. Henshaw*, 101 Mass. 193. It is binding upon the original grantee; and his assigns with notice are bound in like manner, at least to the extent that the performance of the duty may be charged upon the land to which they succeed. The general doctrine of the equitable enforcement of agreements concerning the occupation and mode of use of real estate is explained in the familiar cases of *Whitney v. Union Railway*, 11 Gray, 359, and *Parker v. Nightingale*, 6 Allen, 341. We are brought, therefore, to the conclusion that the obligation imposed by the deed to Richmond may be enforced as an obligation in the nature of a servitude upon the estate of the defendant, though not as a personal obligation of the defendant.

The final question which we have to determine is whether the plaintiff is entitled to recover one fifth part of the cost of repairs upon the reservoir dam, and of the plaintiff's compensation in drawing the water, as well as one fifth part of the sum paid for flowing.

The deed to Richmond does not in terms include such cost of repairs. The language is, that Richmond and his heirs and assigns "shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one fifth part of all sums which they may be held or agree to pay for flowage or damages to the proprietors of any lands by reason of any dam made or which may be made by said Taunton Manufacturing Company, or their successors or assigns, of any part of the estate of the said Taunton Manufacturing Company, upon any stream or waters flowing to their mills." This language does not admit of a construction which will bind Richmond and his heirs and assigns to pay for repairs of the dam. It is limited to sums paid for flowing to the proprietors of other lands.

Independently of this provision, the relation of the parties growing out of the conveyance of the mill privilege and water power would not bind the grantees to pay any part of the cost of such repairs. The right which was granted in respect to the reservoir was not any interest in the dam, but merely some right in respect to the flow of water in addition to that which the grantee would take as riparian owner. The ownership and immediate control of the dam remained with the grantor. The duty of exercising due care to make it safe rested with the grantor alone. The grantor and grantees did not become joint owners of the dam, and would not be jointly liable for damages in case of its giving way, by reason of negligent construction. A right to have a quantity of water, in addition to the natural flow of the stream, sent down from the reservoir, does not carry with it an ownership in the reservoir dam.

The agreement between the Taunton Manufacturing Company and James K. Mills and others, which was made a part of the deed from the former to the latter in 1835, is significant as showing the mode in which it was then understood that the water was to be used; but Richmond was not a party to it, nor does the agreement contain anything to show that it was understood that he was to bear a part of the cost of making repairs.

The agreement entered into by the various mill corporations in 1852, under the name of the Taunton Reservoir and Flowage Company, contained nothing in respect to the cost of repairs, so far as is shown by the agreed statement of facts.

No distinct agreement or stipulation being shown calling for the payment of one fifth of the cost of maintaining the dam, we have to consider whether a servitude has been imposed on the defendant's land by prescription, requiring such contribution. It is agreed that the owners of the defendant's property, "from the time of its conveyance to Charles Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one fifth of the flowage damages caused by the reservoir dam, and one fifth of the expense of repairing the same, and one fifth of the compensation for drawing the water from the same, and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir." After describing the agreement of 1852 between the various mill corporations, the statement of facts recites that from that time down to the present Lovering and the successive owners of the Whittenton Mills have continued without objection to collect from the owners of the several mills the "flowage damages, and repair the reservoir dam, and draw water from the reservoir, and collect from the several mill-owners their respective shares of the expense thereof." The one party collected the money as a right, the other paid it as a duty. It would seem that the evidence is sufficient to establish such a servitude by prescription, if in law such a servitude can be so created.

The duty is of the same character as that which is created by the provision in the deed to Richmond, binding him and his assigns to pay one fifth of the sums paid for flowing. Its connection with the estate and rights granted is equally close. A covenant to make the payments would run with the land. A duty imposed on the grantee and his assigns by stipulation in the deed would be enforced in equity against the land. We see no reason why the same duty may not be established by prescription. In *Doane v. Badger*, 12 Mass. 65, it was recognized, though not expressly decided, that where the owner of a close had an ancient right to take water from a well and pump situated on another close, he might be bound by prescription to keep the well and pump in repair. It is well established that there may be a prescriptive duty to maintain fences. *Bronson v. Coffin*, 108 Mass. 175, 185, and cases cited. Also ways. *Middlefield v. Church Mills Knitting Co.* 160

Mass. 267. See also *Lynn v. Turner*, Cowp. 86; *Kingston-upon-Hull v. Horner*, Lofft, 576, 586; where it was held that there may be a prescriptive duty of keeping the bed or banks of a stream in order. So, where a reservoir dam is maintained for the benefit of several estates, the duty of repairs in whole or in a specified proportion may be established by prescription as a charge against one of the estates in interest.

The duty of paying one fifth of the reasonable compensation for drawing the water rests on the same grounds.

For these reasons, in the opinion of a majority of the court, the payment of the whole sum claimed may be enforced against the land of the defendant.

Decree for the plaintiff.

FIELD, C. J. I am unable to assent to the opinion of a majority of the court. That opinion in effect is that there has been acquired by prescription an easement or servitude in the land of the defendant and its appurtenances, whereby that land is bound to contribute one fifth part of the annual flowage damages caused by the reservoir dam erected by the Taunton Manufacturing Company in 1832, and one fifth part of the reasonable expenses incurred in repairing that dam, and one fifth part of a reasonable compensation for the time and labor expended in drawing water from the reservoir, in accordance with the requirements of the agreement of 1835. The case was submitted upon an agreed statement of facts. The defendant acquired his title to his land, being the Brick Mill and its appurtenances, by two deeds, each dated July 12, 1889. At that time the dam formerly on the land conveyed to the defendant had been carried away and had not been rebuilt, but the mill buildings were standing and the water-wheels were in position, and this condition of things has remained to the present time. The defendant has never operated the mills or used the water power, although he has not abandoned any rights he may have in the water power or in the reservoir.

It is agreed in the statement of facts, among other things, as follows: "The defendant at the time he accepted his deeds did not have actual knowledge of the contents of the award alleged therein to have been delivered to him, or of any of the agreements herein mentioned, but the said award and agreements, and the books of the Taunton Reservoir and Flowage Company, running back for more than forty years, were then and ever since have been in the possession of the plaintiff, and, upon inquiry, the defendant could at any time have ascertained all facts which are herein stated, although he had no actual knowledge of the existence of the said books or agreements. This statement shall not, however, be so construed as to exclude a finding on the facts stated of constructive knowledge." Neither the defendant nor any of his predecessors in title, while owners or occupiers of the estate, was a party to any of these agreements or to the award.

There is much discussion in the opinion of the majority of the court upon the effect of the deed of the defendant's premises from the Taun-

ton Manufacturing Company to Charles Richmond, dated September 6, 1833, and of the mesne conveyances under which the defendant claims title, as well as of the two deeds to the defendant, although this discussion seems not absolutely necessary to the decision. In the deed to Richmond, it is stipulated that the grantee, his heirs and assigns, "shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one fifth part of all sums which they may be held or agree to pay for flowage or damages to the proprietors of any lands by reason of any dam made or which may be made by said Taunton Manufacturing Company, or their successors or assigns, of any part of the estate of the said Taunton Manufacturing Company upon any streams or waters flowing to their mills." This provision is referred to in the subsequent deeds. It covers, however, only one fifth part of the damages for flowage, and does not include any part of the expenses of repairing the reservoir dam, or of drawing off the water of the reservoir.

It is conceded by the majority of the court, that under our decisions these stipulations on the part of the grantees in the several deeds do not constitute technical covenants on their part, because the deeds are deeds poll. Whatever may be true of covenants, I do not think that the promise on the part of the grantee which is implied from the acceptance of the deed can be held to create an easement or servitude in the land of the kind described in the opinion. The decision of a majority of the court does not proceed on the ground of any promise, express or to be implied, on the part of the defendant to perform the stipulations on the part of the grantee in the deed to Richmond, or the stipulations on the part of the grantees in any of the subsequent deeds which constitute the defendant's chain of title. The decree is not against the defendant personally, but it is a decree against his land, and it establishes a charge against this land, not only for one fifth of the damages caused by flowage, but also for one fifth of the expenses of repairing the reservoir dam and of drawing off the water. The decree proceeds on the ground of a right acquired by prescription more comprehensive than anything contained in any of the deeds under which the defendant claims title, which is in the nature of an easement or servitude inherent in the land, but which does not involve any personal obligation of the owner of the land. To establish this easement or servitude, the majority of the court rely upon the following clause in the agreed statement of facts: "The owners of the Brick Mill, from the time of its conveyance to Charles Richmond in 1833, down to the time of its conveyance to the defendant, have annually contributed one fifth of the flowage damages caused by the reservoir dam, and one fifth of the expense of repairing the same, and one fifth of the compensation for drawing the water from the same, and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir, except that, since steam came into general use, steam power has also been employed."

The effect of this decision seems to me to be, that, when any one buys a mill privilege on a stream which at the time of the purchase is unused because the dam on the privilege has been carried away, if the stream has on it a reservoir dam belonging to other persons some distance above the mill privilege, and if as a fact his predecessors in title have maintained the dam on the mill privilege and used the mill, and have also contributed to the maintenance of the reservoir for more than twenty years continuously, an easement or servitude is acquired by prescription in the land which constitutes the mill privilege, for the benefit of the owners of the reservoir, or as appurtenant to the reservoir, to have this contribution continued payable out of the land, even although the purchaser at the time of the conveyance of the mill privilege to him knew nothing of any such contribution, and the registry of deeds contained no information on the subject.

With perhaps one or two exceptions, easements in land are passive in their character, and when acquired by prescription consist in the right to use the servient tenement in a certain manner defined by an adverse user continued for the requisite period of time, and they are acquired by notorious acts done on the land under a claim of right. Payments of varying sums of money from year to year by an owner of a mill privilege to the owners of a reservoir situated on the stream some distance above the privilege are not in their nature notorious acts done on the mill privilege. It is said that there may be a prescriptive duty to maintain fences and ways, and *Bronson v. Coffin*, 108 Mass. 175, and *Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267, are cited. The actual decision in *Bronson v. Coffin* was upon the effect of a covenant of the grantor in a deed. *Middlefield v. Church Mills Knitting Co.* was decided upon a demurrer to the declaration, and it was said that the duty of the defendant to maintain the highway was "sufficiently alleged for the purposes of the case at bar." The manner in which that duty originated did not appear in the declaration. But if it be conceded, without expressing any opinion on the subject, that a duty to maintain fences and repair ways can be established either by prescription or by covenant, these are confessedly exceptions to the general rule that active duties cannot be attached to land. To deduce from these exceptions the rule that there can be attached to land by prescription an active duty to pay money from time to time for the maintenance of an artificial reservoir of water belonging to other persons, miles away from the premises, which is a permanent easement in the land whether the water is used or not, is, so far as I know, attaching unusual incidents to land for which there is no precedent. Secret liens or interests in land, a knowledge of which cannot be obtained by a view of the land itself, or by a search in the proper registry of deeds, certainly ought not to be extended.

As the decision of the majority of the court rests, I think, upon the doctrine of prescription. I do not consider whether such incidents as are attached to the land of the defendant by the decision can be

attached to land by covenants in a deed, or whether in the present case, from the stipulations in the deeds poll which concern the duty of the grantees, a promise can be implied against the present defendant to perform these stipulations, as a continuing promise to whosoever maintains the reservoir, or whether the deeds can be construed as deeds upon the condition that these stipulations shall be performed. Neither do I consider whether a court of equity in this Commonwealth will enforce stipulations for the payment of money contained in a deed poll against the assigns of the grantee. I dissent from the doctrine that, on the facts agreed in the present case, an easement in the defendant's land of the kind described in the opinion of the majority of the court has been established by prescription.¹

Justices HOLMES and LATHROP concur in this dissent.

JACKSON v. STEVENSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892.

[Reported 156 Mass. 496.]

BILL in equity, filed on July 13, 1891, praying that the defendant be restrained from erecting any building in violation of the provisions of a deed. Hearing on the bill, answer, master's report, and plaintiffs' exceptions, before *Knowlton*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.²

C. Almy, (*H. M. Spelman* with him,) for the plaintiffs.

W. A. Hayes, Jr., for the defendant.

BARKER, J. In the year 1853 the city of Boston owned a parcel of land known as the Arsenal Estate, in the vicinity of the southerly end of the Common. The lot was triangular, but truncated at the northerly end towards the Common, and contained an area of about 14,000 square feet, bounded on the west by Pleasant Street, now known as Park Square, and on the other side by lands of private owners. The westerly line was about 232 feet in length, and the greatest depth perpendicular to this line was about 100 feet, while at the northerly end the depth was about 24 feet. At this time the estates surrounding the Common were chiefly used for the more expensive residences. The city caused the land to be divided into eight lots and sold. The plaintiffs are the owners of lot No. 8, while the defendant is the owner of lots numbered 4 and 5; the other lots are owned by different persons, all deriving title through separate

¹ The mere fact that the instrument creating a restriction also provides a measure of damages for a breach, will not prevent a court of equity from enjoining such breach. *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400. And see *Hanbury v. Cundy*, 58 L. T. R. 155.

² A portion only of the opinion is here given.

deeds from the city. In order to provide a general building scheme, and to effect a uniform plan, certain restrictive clauses, intended for the benefit of the lots and of the neighborhood, were inserted by the city in its deeds. The first of these clauses related to partition walls, the second to the front lines of the buildings, and the third required the buildings to be of a width equal to the width of the front of the lot. The fourth restrictive clause provided that "No dwelling-house or other building except the necessary outbuildings shall be erected or placed on the rear of the said lot." The fifth clause was as follows: "No building which may be erected on the said lot shall be less than three stories high, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone, or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house, apothecary's shop, dry goods store, or grocery store, during the term of twenty years from August 25, 1858."

The city conveyed the lots Nos. 4 and 5 in 1856, and the plaintiff's lot, No. 8, in 1858. All the lots were conveyed by the city before the year 1864, and dwelling-houses of substantially uniform design were built, which now remain upon lots Nos. 3, 4, 5, 6, 7, and 8.

No objection had been made by the owners of the plaintiff's estate to any structure erected on any of the lots until this case arose in 1891. The master finds that since August 25, 1873, there has been a considerable change in the character of the neighborhood, the houses being no longer used as dwellings exclusively, but devoted to a considerable extent to business purposes, and that the neighborhood is now, to all intents and purposes, a business or mercantile one. The defendant, owning property on Carver Street abutting on the rear of lot No. 4, and intending to erect a market on Carver Street, proposed to build over the entire rear portion of lot No. 4, a brick structure with a flat roof and raised skylight, for use as a part of and a connection between the ground floor of the building on lot No. 4 and his Carver Street property, designed as a store or market, its exact use depending upon future tenants. The plaintiffs, upon ascertaining this, gave notice that they should insist on a compliance with the restrictions, and, this notice being disregarded, brought their bill, alleging that the defendant is about to erect on lot No. 4 a building which is not a necessary outbuilding, and asking that he may be perpetually enjoined from placing on the rear of lot No. 4 or No. 5 any buildings except necessary outbuildings.

The master finds that the proposed structure is a reasonably necessary outbuilding, if, in construing the fourth restriction, the facts that the operation of the fifth restriction has ceased, and that the neighborhood is now used for general business purposes, are to be considered, unless the defendant's intention to use it in part as a connection between the Park Square and Carver Street buildings shows that it can be in no sense an outbuilding. The plaintiffs except to this part of the master's report, and also to his findings as to structures upon the rear of other lots.

The master finds that the proposed structure would cause no appreciable diminution of light or air, nor any perceptible damage to the plaintiffs' estate, beyond the possible technical damage which the law may assume; and that the structures on the rear portions of lot No. 6 and lot No. 7, which lie between the premises of the parties, are of more considerable importance as affecting the plaintiffs' premises than the proposed structure would be.

Whether the right to equitable relief is affected by acquiescence depends upon the circumstances of each case. Where such a defence is claimed, the facts relating to it become material, and may be inquired into. The exception to the finding of the master relative to structures upon the other lots must therefore be overruled. *Roper v. Williams*, Turn. & Russ. 18; *Peek v. Matthews*, L. R. 3 Eq. 515; *Ware v. Smith*, ante, 186.

We assume that when restrictions inserted in the deed of a particular lot are part of a general scheme for the benefit and improvement of all the lands included in a larger tract, a grantee of any part of the land may, under proper circumstances, enforce them against his neighbor. *Whitney v. Union Railway*, 11 Gray, 359; *Parker v. Nightingale*, 6 Allen, 341; *Linzee v. Mixer*, 101 Mass. 512; *Tobey v. Moore*, 130 Mass. 448; *Beals v. Case*, 138 Mass. 138; *Payson v. Burnham*, 141 Mass. 547; and that the restrictions inserted by the city in its deeds were of this nature. *Hano v. Bigelow*, 155 Mass. 341. We also assume that the restrictions, except as expressly limited in duration, were intended to be permanent; and that the structures which the defendant proposed to erect were not necessary outbuildings, within the meaning of the fourth restriction. *Keening v. Ayling*, 126 Mass. 404; *Sanborn v. Rice*, 129 Mass. 387, 397; *Ayling v. Kramer*, 133 Mass. 12, 14; *Hamlen v. Werner*, 144 Mass. 396. We also assume that an owner having the right to enforce such a restriction, if otherwise entitled to sue in equity, is not obliged to wait until after the objectionable structure is erected before bringing his bill; *Peek v. Matthews*, L. R. 3 Eq. 515; and that relief may be granted, although no actual serious pecuniary damage may have been sustained, or is to be expected; *Attorney General v. Algonquin Club*, 153 Mass. 447, 455; and that an owner may neglect to object to infractions of restrictions to some extent, without losing his right to enforce the restrictions when they more clearly and seriously affect him. *Linzee v. Mixer*, 101 Mass. 512, 531; *Payson v. Burnham*, 141 Mass. 547, 556.

Assuming these points in favor of the plaintiffs, we are nevertheless of the opinion that an injunction should not be granted in the present case. It is evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences; and that, owing to the general growth of the city, and the present use of the whole neighborhood for business, this purpose can no longer be accomplished. If all the restrictions imposed in the deeds should be

rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and, since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made. *Duke of Bedford v. British Museum*, 2 Myl. & K. 552; *German v. Chapman*, 7 Ch. D. 271, 279; *Sayers v. Collyer*, 24 Ch. D. 180, 187; *Columbia College v. Thacher*, 87 N. Y. 311; *Starkie v. Richmond*, 155 Mass. 188.

But as the plaintiffs have no remedy at law against the defendant, the bill should be retained for the purpose of assessing their damages. Upon the master's report, they are entitled to some damages, and we do not understand him to find that, upon the view which we have taken, the damages are merely nominal. The case is to be referred to an assessor to report the damages caused to the plaintiffs by the erection of the structures which the defendant has caused to be built since the bringing of the bill, but an injunction is denied. *So ordered.*¹

¹ And see *Sayers v. Collyer*, 24 Ch. D. 180, 28 Ch. D. 103. Cf. *Craig v. Greer*, [1899] 1 Ir. 258; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *Amerman v. Dean*, 182 N. Y. 355.

"But, further, before granting equitable relief, Courts of Equity look not only to the words of a covenant, but to the object to attain which it was entered into, and if, owing to circumstances which have occurred since it was entered into, that object cannot be attained, equitable relief will be refused. This doctrine was laid down and acted upon by Lord Eldon and Sir Thomas Plumer in *Duke of Bedford v. Trustees of the British Museum*, 2 My. & K. 552; and by Wood, V. C., in *Peck v. Matthews*, L. R. 8 Eq. 515, and was recognized in *German v. Chapman*, 7 Ch. D. 271. It is upon this ground that restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced if the land has already been so laid out or used that its preservation as intended is no longer possible. Such a state of things can seldom if ever have arisen except from a departure by the vendor and the purchasers from him from the scheme, or from the acquiescence or laches of those entitled to enforce the observance of the covenants in question; but, whatever the explanation of the altered state of things may be, if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused. Nor do I understand the observations of Bowen and Fry, L. JJ., in *Sayers v. Collyer*, 28 Ch. D. 103, to be opposed to this view of the law. Their object evidently was, not to discredit the cases I have referred to, but rather to guard against a loose application of the principle on which they proceed." LINDLEY, L. J., in *Knight v. Simmonds*, [1896] 2 Ch. 294, 297.

A waiver of a right to enforce a covenant against one lot is not necessarily a waiver as to all other lots in the tract. *German v. Chapman*, 7 Ch. D. 271, 278.

Mass. R. L., c. 184, sec. 20, provides that restrictions unlimited to time shall be binding for thirty years only from their date.

On the extinction of a restriction by a conveyance of the land to the covenantee, see *Keates v. Lyon*, L. R. 4 Ch. 218. Cf. *Electric City Land Co. v. West Ridge Coal Co.*, 187 Pa. 500.

As to the liability of the covenantor after he parts with the land, see *Carr v. Lowry's Admr.*, 27 Pa. 257; *Clark v. Deroe*, 124 N. Y. 120 (cf. *London, Chatham, & Dover Ry. Co. v. Bull*, 47 L. T. R. 418); *Hickey v. Ry. Co.*, 51 Ohio St. 40.

CHAPTER V.

PUBLIC RIGHTS.

SECTION I.

WATERS.

A. Navigation.¹

NOTE. — "It does not necessarily follow, because the tide flows and refloes in any particular place, that it is therefore a public navigation, although of sufficient size. . . . If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel." BAYLEY, J., in *King v. Mountague*, 4 B. & C. 598, 601, 602 (1825).

"All streams below tide-water are, *prima facie*, public; and all above tide-water are, *prima facie*, private, not subject to a public right of flottage upon them. Bashi Creek, being above tide-water, is, *prima facie*, not a navigable stream." The onus of proof was, therefore, upon the party claiming for it the character of a navigable stream." WALKER, C. J., in *Rhodes v. Otis*, 33 Ala. 578, 593 (1859).

"The term 'navigable waters,' as commonly used in the law, has three distinct meanings: 1st, as synonymous with 'tide-waters,' being waters, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt; or, 2d, as limited to tide waters which are capable of being navigated for some useful purpose; or, 3d (which has not prevailed in this Commonwealth), as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation." GRAY, J., in *Com. v. Vincent*, 108 Mass. 441, 447 (1871).

"THORP saith, if a water be a high street, which water by its own force changes its course upon another soil, yet it shall have there the same high street as it had before in its ancient course, so that the lord of the soil cannot disturb the new course; it was so adjudged in the eyre at Nottingham." 22 Ass. 98 (1349).

"The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or, at least, to any considerable extent, which are not subject to the tide; and from this circumstance tide water and navigable water there signify

¹ "Nor do we think the right of navigation in a public river can with propriety be treated as 'real estate' vested in the public or the State for the benefit of every individual who may have occasion to use it. It is a public right, but we see no reason to call it real estate. It is sometimes called a 'public easement,' but we do not think it comes within the meaning of the term easement, as used to designate an incorporeal hereditament, as a right of way belonging to one person or estate over the lands of another." CHRISTIANCY, J., in *Barnard v. Hinkley*, 10 Mich. 458, 460 (1862).

substantially the same thing. But in this country the case is widely different. . . . A different test, must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact." FIELD, J., in *The Daniel Ball*, 10 Wall. 557, 568 (1871).

"It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said (21 Pick. 344), 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.' The learned judge of the court below rested his decision against the navigability of the Fox River below the De Pere Rapids chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation. This is true, and these obstructions rendered the navigation difficult, and prevented the adoption of the modern agencies by which commerce is conducted. But with these difficulties in the way commerce was successfully carried on, for it is in proof that the products of other states and countries were taken up the river in its natural state from Green Bay to Fort Winnebago, and return cargoes of lead and furs obtained. . . . Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars." DAVIS, J., in *The Montello*, 20 Wall. 480, 441 (1874).

BALL v. HERBERT.

KING'S BENCH. 1789.

[Reported 3 T. R. 253.]

TRESPASS for breaking and entering the plaintiff's close, being part of an artificial bank adjoining to the River Ouze, at Wiggenhall, in Norfolk, and treading down the grass with men and with horses, and fixing lines, &c., to certain barges, and drawing and towing those barges.

Plea, that the port of King's Lynn in the said county hath been immemorially a common and public port for all the king's subjects; and that the River Ouze hath been immemorially a public king's highway and navigable river, where the tide flows and reflows, leading between the port of King's Linn and the village of Stow in the same county, to

wit at Wiggshall, for boats, barges, and lighters, &c., at all times of the year, &c. That the close in which, &c., hath been immemorially part of the banks of and adjoining the said highway and navigable river. That the defendant at the time when, &c., was possessed of the several boats, barges, and lighters, in the declaration mentioned, which were laden with goods and merchandises, and passing up and down the said highway and navigable river, and going to and from the said port of King's Lynn; by reason whereof, &c., he entered with his said horses, &c., and drew and towed his said boats, &c., as stated in the declaration.

To this there was a general demurrer and joinder.

Graham, for the plaintiff.

Wilson, for the defendant.

LORD KENYON, C. J. I remember when the case of *Pierse v. Lord Fauconberg* [1 Burr. 292] was sent here from the Court of Chancery, it was the current opinion of Westminster Hall that the right of towing depended upon usage, without which it could not exist. It has been said that this right now in question is of great importance to the navigation through several counties; now if this navigation has been carried on for a series of years, and this right of towing constantly exercised, there would be abundant usage on which it might be supported. But that is abandoned, and the defendant resorts to the common law right. Now common law rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the universal and immemorial usage throughout the country. That the right now in question is not to be collected from the unanimous current of authorities, is manifest. Very little is to be found in the books upon the subject, the whole of which down to this time Lord Hale has collected; and after commenting upon it, he seems to have formed an opinion against the right; for he says that, where private interests are involved in the question, they shall not be infringed without a satisfaction being made to the parties injured. But on what ground can a common law right stand, if satisfaction is to be made for the enjoyment of it, and that satisfaction not ascertained? It must resolve itself into an agreement between the parties, and cannot be considered as a right to use the banks *indefinitely*. And some of the passages in Lord Hale, which seem to favor the common law right, are rather applicable to banks of the sea, and to ports; and it is part of the king's prerogative to create ports, which was lately exercised at Liverpool. Then is this bottomed on immemorial usage: the right is not claimed on one side or the other as is most convenient, but on both sides of the river. But that is directly contrary to common experience; for if we look at any of the great public rivers, we shall find that it is not used, although it would be highly convenient to the persons using the navigations. On the contrary, the navigators are obliged at several places to pass from one side of the Thames to the other, with great inconvenience and delay; that is the case by the Duke of Montague's gardens between Richmond and

Kew, and in various other parts. Such is the right on that river, the *quantum* of which is ascertained by the usage. That there is such a custom on most of the navigable rivers, no person doubts, but still the right is founded solely on *the custom*; but here the claim is set up without any custom at all. The authorities which have been mentioned are very few. The case in Lord Raymond, 1 Ld. Raym. 725, though before an eminent judge, was only a *nisi prius* decision. It is a short note, *vid.* 1 Burr. 36, taken by Lord Raymond when he was very young; not even the name of the case is given; and it does not appear what the case was, or how the question arose: I rather think the principal question there was whether, when a right of passage was ascertained, and that was found, the party entitled might not go on the adjoining land. However, at most it is only an opinion delivered at *nisi prius*; opposed to which is that of Lord Ch. J. Willes in the case cited. And Lord Hardwicke's opinion was against the right, as is evident from the manner in which he sent the case of *Peirse v. Ld. Fauconberg* into this court, which was very fully considered. Therefore, on these authorities, on the silence in the books respecting this common law right, and on account of the extreme inconvenience to which individuals having lands adjoining the public rivers would be subject, I cannot bring my mind to say that the defendant's justification can be supported. Perhaps small evidence of usage before a jury would establish a right by custom on the ground of public convenience; but the right here claimed extends to every bank of every navigable river throughout the kingdom.

ASHHURST, J. I am of opinion, first, that no such *general* right exists as that claimed; and, secondly, if *any qualified* right could be supported, the defendant's plea is not adapted to it. As to the first, it seems extraordinary (if there be any such right) that it is not defined with greater certainty in any of our law books. For it is a right that in its nature must, if it existed, be subject to some restrictions; as that it should be exercised only on one, and that the most convenient, side of the river; for it would in many instances be a very oppressive right if it could be claimed *on both sides*. The state of property on the Thames is strong evidence to show that no such general right exists; for there is no instance in any part of the banks of that river where the right is claimed *on both sides*; and yet the defendant's claim would go to establish a right on both sides. The instances which have been mentioned where the right of towing has been given by several Acts of Parliament, also negative the idea of general right; for we are not to suppose that rights should from time to time have been given by the Legislature which existed before; and it is no answer to say that such provisions were inserted *ex abundanti cautela*. And the reason assigned by the defendant's counsel why such a right was given by the 24 Geo. 2, c. 8, namely, because that part of the river was not navigable before, is not satisfactory; for when once a river becomes navigable, or, in other words, when it is made a common highway for all the king's subjects,

that right would immediately attach. On the general ground therefore I think no general right of towing exists. But then it was contended that a right might be supported on making a reasonable compensation to the owner of the land. Lord Hale touches this right very tenderly; for he says that it does not exist without making a reasonable satisfaction. But it is not necessary to enter into that question here; because, if it were a right *sub modo*, it ought to have been so claimed in pleading. And even if such a right existed, the party should either pay or tender a reasonable satisfaction in order to give them that right. For it would be to no purpose to give the owner merely a right of action to recover that compensation, when it is to be enforced against strangers passing by, whom the owner cannot know, and who perhaps may be foreigners.

BULLER, J. The defendant's plea on this record rests wholly on a general common law right; in deciding which it is not necessary to go into the question, which has been made respecting the mode of pleading. This being claimed as a common law right, it can only be proved to exist by one of the ways mentioned by my Lord. As to the general usage throughout the kingdom of which the court is obliged to take notice, that clearly does not exist. Then the question is whether in our books, or on records, that right is established for which the defendant contends. The case in Lord Raymond is a very loose and inaccurate note. Another authority cited is the passage in Bracton, and quoted by Callis; that plainly appears to have been taken from Justinian, and is only part of the civil law; and whether or not that has been adopted by the common law is to be seen by looking into our books; and there it is not to be found. Callis compares a navigable river to an highway; but no two cases can be more distinct. In the latter case, if the way be foundèrous and out of repair, the public have a right to go on the adjoining land: but if a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands. Therefore I am of opinion that no common law right of towing exists. But I wish not to be precluded by this determination from giving an opinion on the question, which has been made on the pleadings, whenever it shall arise in future. At present I cannot agree with what has been said on that head. This is not like the case of toll thorough. The distinction, which has been made between toll thorough and toll traverse, is not where the question arises on a defence merely, but where the right itself of taking toll has come in question. And the distinction taken is, that the party, who claims toll thorough must show a consideration for it, because it is against common right; but in the case of toll traverse, no consideration need be shown, because that is not against common right. Then if the defendant is right in saying that by the common law he has a right to go on the banks of navigable rivers, he need not show any consideration, and the owner of the land would not be entitled to any satisfaction till after the defendant had used the towing-path. Customs, which

are consistent, may be pleaded against each other. And the party pleading a general custom need not show the modification of it, which is not inconsistent with the right claimed by him. The case of *Kenchin v. Knight*, 1 Wils. 253, is strong to this point: there the defendant pleaded a custom to put swine upon a common; to which the plaintiff replied that he could only put in such swine as were rung, without traversing the custom set up in the plea: and the replication was held good on demurrer, because the customs were not inconsistent. Now here, if every subject has a right to tow on the banks making a reasonable satisfaction, it is not necessary for the party to plead such satisfaction, because that claim arises afterwards. And if it were otherwise, it would be attended with manifest inconvenience; because, the sum not being ascertained, it would be a perpetual dispute between the owners of the barges and the land-owners how much should be paid, which would be destructive of the right of the public, and the navigation would be stopped till the *quantum* was ascertained. I have said thus much on the subject lest I should be precluded from considering the question, whenever it should arise; but in the present case I am of opinion against the common law right. In addition to the observations made on the cases cited, I think that the instances of the three great rivers alluded to are very strong against the right. From what passed in the case of *Vernon v. Prior*, it seems as if Lord Ch. J. Willes entertained a wish that the public should have this right, and yet he could find no legal ground on which to support it; for the application to Parliament in 1748 is said to have been made with his approbation. On the River Trent there have been some claims of this sort of a more recent date not unworthy of notice. The persons passing there with barges endeavored to set up this right, in consequence of which several actions were brought against the barge-owners, who, on being advised that they could not support the right, suffered judgment to go by default. But they still continued their towing, on which actions were again brought against sixty or seventy persons at the same time, and then they abandoned their claim. The state of the banks of the Thames also affords a strong argument against this common law right; for if it exist, all the houses built on those banks must be considered as nuisances.

GRÖSE, J. It is enough for me at present to say that I perfectly agree in the general position, that there is not any *general* common law right of towing.

*Judgment for the plaintiff.*¹

¹ In some early cases it was held that ownership of the banks of rivers was subject to public rights of towing; as in *Young's Case*, 1 Ld. Raym. 725; *O'Fallon, Ex'or, v. Mullanphy*, 4 Mo. 343.

ANONYMOUS.

Nisi Prius. 1808.

[Reported 1 Camp. 517, note.]

ACTION for disturbing plaintiff's fishery in the River Tweed. It was proved that defendant's ship was moored against a rock on the bank of the river, where she delivered her cargo, and that plaintiff was prevented by the situation of the ship from taking so many fish as he would otherwise have done. It further appeared, that ships frequently lay there, waiting for a wind, and that there were mooring rings upon the rock, to one of which the ship in question was fastened.

WOOD, B. A navigable river is a public highway; and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please. Nevertheless, if they abuse that right so as to work a private injury, they are liable to an action. The question will therefore be, whether the defendant has abused his right? The privilege of the plaintiff must be subservient to the right of the public. It would be of very mischievous consequences if the owner of a fishery could prescribe to the public how and where they are to moor in a navigable river. The only case I remember like this, was where a man obstinately refused to move his ship from opposite a wharf, although it would have been just the same if he had moved a little one way or the other; and therefore he abused his right, and the plaintiff recovered. The defendant had a right to moor and remain where his ship lay, as long as convenience required. Yet if he acted wantonly and maliciously for the purpose of injuring the fishery, the plaintiff is entitled to a verdict, but not otherwise.¹

ORIGINAL HARTLEPOOL COMPANY v. GIBB.

CHANCERY DIVISION. 1877.

[Reported 5 Ch. D. 718.]

THE plaintiffs, who were coal-merchants, were lessees and occupiers of a wharf known as Keeper Wharf, abutting on the River Thames at Ratcliff, having a frontage of 125 feet on the river. On the west side of the said wharf was a wharf and a dock known as Ratcliff

¹ See *Mayor of Colchester v. Brooke*, 7 Q. B. 339, 372; *Cobb v. Bennett*, 75 Pa. 326; *People's Ice Co. v. Excelsior*, 44 Mich. 229; *Woodman v. Pitman*, 79 Me. 456; *Milwaukee Gas Light Co. v. Schooner "Gamecock"*, 23 Wis. 144.

On the right to place permanent moorings in the foreshore, see *A. G. v. Wright*, [1897] 2 Q. B. (C. A.) 313.

Cross Dock, occupied by the defendant, and abutting on the river. On the east side of Keeper Wharf was a public landing-place projecting on the river, and preventing any vessel lying alongside the said wharf from overlapping on the east side of such wharf.

The plaintiffs issued their writ on the 25th of November, 1875.

The statement of claim alleged that the plaintiffs, in the ordinary course of their business, employed a steam collier known as the *Ludworth*, which was brought alongside their wharf for the purpose of unloading, and that this vessel, being 175 feet in keel, and not being able to overlap on the east side of the wharf, was obliged to overlap the adjoining wharf of the defendant.

It was further alleged that the defendant had lately moored or attached by iron chains to the extremity of his wharf, next to that of the plaintiffs', large wooden obstructions, and that such obstructions floated on the river when the tide was up, and projected for some distance into the river, and prevented the plaintiffs from bringing the *Ludworth* alongside their wharf and there unloading it; that such obstructions amounted to a public nuisance, as interfering with the navigation of the river, and the plaintiffs had requested the Conservators of the Thames to remove them, but they had declined to interfere; and that such obstructions occasioned special and serious damage to the plaintiffs.

The plaintiffs claimed that the defendant might be restrained from allowing the said obstructions to remain so as to prevent the *Ludworth* from coming and remaining alongside their wharf for the purpose of unloading; and that the damage sustained by the plaintiffs from the acts of the defendant might be assessed and paid to them by the defendant.

An interim injunction was obtained by the plaintiffs.

The defendant, by his statement of defence and counter-claim, delivered the 6th of March, 1876, stated that the entrance to his dock called Ratcliff Cross Dock, was 41 feet wide, and the east side of such entrance was 48 feet distant from the west side of Keeper Wharf; that the *Ludworth* when moored alongside Keeper Wharf, overlapped the defendant's wharf and dock 52 feet, her stern extending 5 feet in front of the dock gates, and at low water she lay on the foreshore between high and low water, and rested on the campshed and piles in front of the defendant's wharf; that the wooden obstructions referred to in the statement of claim were merely an ordinary raft of timber for the use of the defendant; that it had always been the custom on the River Thames for owners of dry docks to moor such rafts of timber in front of their wharves, and that the defendant's raft was so moored by permission of the Conservators of the Thames. The defendant denied that the raft was a public nuisance, or occasioned any damage or loss to the plaintiffs.

The defendant, by way of counter-claim, stated that the plaintiffs had on several occasions moored the *Ludworth* so as to overlap the

defendant's wharf, and so moored her at unreasonable times, and kept her so moored for an unreasonable time, thus depriving the defendant of all access to, and the use of the frontage to that part of his wharf which lay between his dock-gates and the plaintiff company's wharf, and was a serious and dangerous obstruction to the access to the defendant's dock, and vessels entering and leaving the same were exposed to great risk of collision with the steamer, and that by reason of such obstruction the defendant was obliged to employ more time and labor in docking and undocking ships than would otherwise be necessary. The defendant alleged that on one occasion the Ludworth remained moored for twenty hours, thereby greatly delaying the undocking of a vessel.

The defendant claimed that the plaintiffs might be restrained by injunction from mooring the Ludworth, or any other vessel, so as to obstruct the access to the defendant's dock and wharf; secondly, that if the court should be of opinion that the plaintiffs were entitled so to moor their steamer or other vessel, that they might be restrained from doing so except at reasonable times, and from keeping it so moored, except for a reasonable time; thirdly, that damages might be awarded to the defendant in respect of the wrongful acts of the plaintiffs.

It appeared that there had been for a considerable time an agreement between the plaintiffs and the defendant, under which the plaintiffs were authorized to berth the Ludworth opposite their wharf at a distance of about twenty-five feet, but not so as to interfere with the access of vessels to and from the defendant's dock. This agreement expired on the 10th of October, 1875.

Witnesses were examined on behalf of the plaintiffs and the defendant. It appeared that the plaintiff's wharf had been used for the purposes of their trade for twenty-three years; that the steam-collier, though overlapping the defendant's wharf, did not, in fact, interfere with access thereto, inasmuch as the defendant admitted that he did not use the premises for the purposes of a wharf. The defendant said that the raft complained of by the plaintiffs was a raft of timber logs used for the purpose of his business as a repairer of ships, but admitted that after the said agreement came to an end it was attached to his wharf in such way as to obstruct the access of the collier to the plaintiffs' wharf.

With regard to the alleged interference with the access of vessels to and from the defendant's dock, according to the defendant's evidence, about seventy vessels came in and out of his dock in the course of the year; sometimes two vessels entered or left the dock the same day. The time when free access was required to the dock-gates was two hours and a half or three hours before the flood-tide. Evidence was adduced for the purpose of showing that when the collier was at her moorings there was greater risk to vessels entering or leaving the dock than at other times, and that the employment of additional hands had occasionally been rendered necessary.

Roxburgh, Q. C., Caldecott, and Edward Ford, for the plaintiffs.

Chitty, Q. C., Laing, and R. E. Webster, for the defendant.

JESSEL, M. R., after some observations as to the conduct of the parties, continued:—

What is the law, first of all, as regards obstruction? The plaintiffs say in effect, "The Thames is a public highway navigable by all her Majesty's subjects in a reasonable manner and for reasonable purposes, and the defendant has no right to obstruct the highway." The first question is, Do the plaintiffs navigate it in a reasonable manner and for a reasonable purpose? Unquestionably they do. The vessel they use is not a long vessel compared with others in the trade for which it is used. It is not denied that it is a vessel of ordinary length. Some are longer, and some are shorter. It is a reasonable vessel for the purpose. It comes for a reasonable and proper purpose, to bring coal to the Thames, where coal has been delivered now for ages; and it comes to a wharf which has been used certainly for twenty-three years, and probably for longer, as a coal wharf. Therefore they are using the river for a reasonable purpose with a reasonable vessel and in a reasonable way. They have a right to go to their own wharf, and not the less a right because in mooring the vessel out in the stream, twenty-five feet from the shore, that vessel projects over some other wharf or some other part of the shore. There is no law which says that your vessel shall be the exact length of your wharf and no longer, any more than there is any law that your carriage, or your wagon, shall be the exact length of the breadth of your door, or your frontage to the street. It is not illegal to bring in a coal wagon which is a good deal longer than the frontage of your house, in front of your house to deliver the coal; otherwise people who have small houses could never have a coal wagon full of coals. Nobody says that anything of the sort is illegal. Consequently, all that they have done was perfectly legal, perfectly right, and perfectly usual,—subject to what I am going to say.

In ascertaining, however, the reasonableness of the acts of the plaintiffs, one consideration must not be overlooked. Besides a reasonable right of access, they have a reasonable right of stopping, as well as of going and returning in the use of the highway. But what is a reasonable right of stopping? That must depend upon circumstances. You cannot lay down *a priori* what is reasonable. You must know all the circumstances. It would be clearly reasonable, for instance, if a wheel came off an omnibus in the middle of a highway, for a blacksmith to be sent for to put the wheel on the omnibus if that were the easiest mode of moving it out of the way, and the omnibus might lawfully stop there until the wheel was put on, in order to take it out of the way, if that were the best mode of taking it out of the way and a reasonable and usual mode. Nobody would deny that if the blacksmith chose to carry on his trade of repairing omnibuses immediately opposite his own house, and, for that purpose, not keep

ing any one omnibus more than a reasonable time for his work, he kept omnibuses opposite his house, or shop, or smithy-door for that purpose, that would be an obstruction of the highway, and would be a nuisance. You must look at the circumstances. So, again, it is perfectly reasonable that A. shall put his carriage before his house door, even although it may overlap his neighbor's door. For instance, take the houses which have been divided, — houses in Portland Place; that is a familiar instance to me, and I dare say to most of us, — where two doors immediately adjoin. It is impossible to draw up a carriage to the one without overlapping the other. There is no doubt that it is quite a reasonable thing to stop a carriage there for the purpose of taking up and setting down, or even for the purpose of waiting there a reasonable time. But suppose the neighbor's carriage comes up, and wants either to take up or to set down, it would be monstrous to hold that the coachman of the first carriage should not move out of the way. It would then become unreasonable. When he sees the neighbor's carriage coming up, he is then bound to get out of the way, and he commits a private nuisance to his neighbor, in the nature of a public nuisance, by stopping before his door and preventing his coming up, he not requiring to stop there. In that case, therefore, if he persisted in doing this day after day, I have no doubt that his neighbors might bring an action against him and get, no doubt, nominal damages; but nominal damages would establish the right and carry the costs. That is a simple illustration of what I mean.

In the same way it is not unreasonable that your neighbor should give an evening party occasionally, and that there should be a file of carriages running across your door or opposite your door. But it would be very unreasonable if anybody did not break the file to allow your carriage to come up to your own door, and still more unreasonable if, instead of giving parties occasionally, as people do, your neighbor were to turn his house into an assembly room or for some private purpose, in consequence of which a file of carriages came every day, and obstructed the carriage-way to your house. I only give these as illustrations. The law is quite clear. The question of reasonableness has been said to be a question for a jury. It must be reasonable user, and nothing else.

Let me try this question of reasonable user as regards the collier, as I will afterwards with respect to what is alleged in the counter-claim. Is it reasonable, when there are two wharves on the Thames, and one man has a wharf of a certain length and another of a certain length, and the length of one wharf is less than the length of the steam-collier which comes opposite to it, that that steam-collier should stop opposite the other man's wharf and impede the access thereto? I say that is utterly unreasonable: each man has a property in his wharf, a profitable property, and he has a reasonable right of access, the same as his neighbor; and, therefore, if he were using the wharf for vessels alongside of it, as the other was using the wharf for

vessels alongside of it, what right has the one to impede the access of the other? As a general rule he has no such right. Where, however, the one is not using his wharf for that purpose, which is the case here, he cannot object to his neighbor's vessel lying opposite in the river, because it does not injure him. If this defendant had been carrying on the business of a wharfinger and using it for vessels coming up, I should have held it most unreasonable for the collier to stand in the way to prevent his carrying on his trade in the regular way. It would be, in fact, an attempt by the plaintiffs to appropriate, without payment, the use of the defendant's wharf when both were carrying on the trade. But, in the present case, it is not so. The defendant has never used his wharf as a wharf, but has merely made use of his property in a legal way, as he has a right to do, as a kind of dry dock for the repairing of vessels; and the only access he wants is useful and commodious access for his vessels through the gates of the dry dock when he is docking and undocking vessels. It follows from what I have said, that the plaintiffs have no right to come there and stop there so as to impede that access. If they do come there and stop there before his wharf so as to impede his reasonable access to his dock-gates, I should say they were committing a nuisance, and liable to an action.

What does that mean? It means this, that they must not stop opposite to the entrance of the defendant's dock during the hours he wants it. He does not want it every day. This is proved in evidence by himself.

His evidence shows that he uses his dock for about 100 days in the year. It follows that every other day in the year except those 100 days the plaintiffs have a clear right, which ought not to be interfered with; because the defendant does not use his wharf for any other purpose, and even on these 100 days he does not want it all day. According to his account, he wants it for two hours and a half or three hours before the flood-tide.

Therefore the steamer has a right to be there, as far as he is concerned, for all the other hours of the day. But supposing it is there opposite his dock-gates when he wants to dock and undock, it ought to go out of the way. It has no right to be there, and when it is asked to go out of the way it should go out of the way; and even without asking, when they see that a vessel is coming up to be docked or undocked, it ought to go out of the way. But still it has a right to be there, moving out of the way when it is impeding the access. It is merely lying in the river, a public highway, for a lawful purpose, — for discharging its cargo, — and therefore it has a right to be there. That being so, it follows from what I have said that the defendant had no right to stop the access of the vessel to its berth. The steam-collier had a right to go to her berth, a right to navigate the river, and be in the river, and she had a clear right to do so two thirds of the days in the year, and for nine tenths of every day of the

remaining 100 days. Now, what the defendant has done is this: he has stopped her getting there at all. He has put an obstruction in the river which prevents her getting there any day of the year, or at any time, — which clearly is wrong. As to the way the obstruction is fastened, that does not matter. The defendant himself said it was fastened to the wharf in such a way, and purposely so fastened, that the plaintiffs' vessel could not get up at all to her berth. It was intended to be so. That was clearly an illegal obstruction in the public highway.

One need not discuss the exact nature of the obstruction, or how it was fastened, because it was admitted that it was fastened in such a way as to prevent, and did prevent, the collier getting up. Therefore that obstruction was unlawful.

I will notice the two justifications, or attempted justifications, which were made for putting it there. First of all, it was said that it was put there, being in fact a raft of timber logs which were used by the defendant in his business as a repairer of ships, and that he had a right to put his logs there. That, in my opinion, is no defence at all. You have no right to obstruct a public highway; whether it is useful to yourself or not, that is quite immaterial. It is no answer to say that you use it for carrying on your business. The answer is, that the Thames is not a timber pond. You have no right to make that use of the Thames, which is a navigable highway. No doubt it may be done where it does not interfere with the access of the public, — it may happen on other parts of the river, where it does not interfere with the vessels going or returning, passing or repassing, because the Conservators may not interfere, and may allow you to moor timber. But it is quite plain that that is not the proper mode of using the highway. It is not a reasonable use of the highway to keep your timber logs there for a longer time than is necessary to take them to your dock. You must not keep them there as a reserve, to be used in the same manner as a timber dock. It is no answer at all. Then, if you do moor timbers there, you must not fix them in such a way that vessels cannot get up to the adjoining wharf; because the real point in the case and the *gravamen* of the charge against the defendant is that he prevents the access of the plaintiffs' vessel. Therefore his so fixing the timber would be wrong.

The other ground of defence which struck me as a very odd one was this, that the defendant knew the plaintiffs' vessel would stay there for a long time, and therefore he had a right to obstruct her. The answer is, he could not know it beforehand, because, as I have said before, he might have obstructed her for every day in the year, at least for two thirds of the days, when it would have been no injury to him if she did not stay an unreasonable time, and, even on other days, how could he tell beforehand that she was going to stay an unreasonable time? It seems to me to be no defence whatever as regards the plaintiffs' action, which, in my view of the law, is an undefended action.

Now, I come to the counter-claim. I have already ruled that the counter-claim, as regards damages, is confined to the writ. The counter-claim is founded, as I understand, upon nuisance. I have already said that if even less than is alleged in the counter-claim were proved, the defendant would be entitled to succeed in the action. I do not say that it is necessary to prove a case of danger. Interference with reasonable access to his own property is, in my own opinion, such a nuisance as would maintain an action. But as a good deal of evidence has been gone into upon that point of danger, I must say that in my opinion, although I think there was some slight additional risk, there was really nothing of any importance as regards danger; and I think the defendant's own conduct shows it. He is a reasonable man of business; and if there were any serious danger, he would not have allowed the vessels to be docked and undocked whilst the collier was there. I think more of men's conduct than men's opinions. But, as regards expense, there is clearly additional expense. The plaintiffs have no right to impose even an addition of two men for two or three hours on the defendant; and they have no right, as I said before, to interfere with his reasonable access; and if this had been proved, I should have given, no doubt, very small damages; but I should not have granted an injunction, for this reason, that the plaintiffs do not claim a right to obstruct. They deny the obstruction.

This being the state of the matter, although I think the defendant's contention reasonable to this extent, that he has a right to say that the plaintiffs shall not deprive him of a valuable property which belongs to him, by keeping their collier opposite his wharf for an unreasonable time and for an unreasonable purpose, still, as he has not made out that case at present, there are no grounds upon which I can give him judgment on his counter-claim.

Therefore, all that remains for me is to make the injunction, which I have already granted, perpetual, and to give the plaintiffs the costs of the action.¹

BROWN v. CHADBOURNE.

SUPREME JUDICIAL COURT OF MAINE. 1849.

[Reported 81 Me. 9.]

WELLS, J.² This is an action on the case for erecting and maintaining a dam across a stream, called Little River, and obstructing the passage of the water, and the plaintiff's logs.

¹ And see *People v. Horton*, 64 N. Y. 810; *Pollock v. Cleveland Ship Bldg. Co.*, 56 Ohio St. 656; *Sherlock v. Bainbridge*, 41 Ind. 85; *Harrington v. Edwards*, 17 Wis. 586.

But cf. *The William H. Brinsfield*, 39 Fed. R. 215.

² The opinion only is given.

The river is about three miles in length, and runs from Boyden's Lake to the tide waters. It varies in its width from seven or eight feet to three or four rods, and it has been used many years for floating logs and rafts, and sometimes boats. Within twenty years, several dams and mills have been erected upon it.

The plaintiff disclaimed the right to recover upon the ground of prescription or user, but claimed it because the stream was a public one in its natural state.

The jury were instructed that, it being a fresh-water stream, the presumption is, that it is private property, and the burden is on the plaintiff to establish the contrary by satisfactory proof that it is a navigable or floatable river, and in its natural condition capable of being used for running logs.

The rule of the common law, that riparian proprietors own to the thread of fresh-water rivers, has been adopted in this and many other States of the Union. *Berry v. Carle*, 3 Greenl. 269; *Spring v. Russell et al.*, 7 Greenl. 273.

The first question that arises is, it being conceded that the bed of the river belongs to the owners of the land on either side, Can a right to the use of its waters be obtained, unless that use has been continued twenty years, the ordinary length of time for the acquisition of an easement?

In *Berry v. Carle*; *Shaw v. Crawford*, 10 Johns. R. 236; *Scott v. Wilson*, 8 N. H. 321, the right is considered as dependent on long usage.

Lord Hale, in his celebrated treatise, *De Jure Maris*, chap. 2, says: "For, as the common highways upon the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water, and as the highways by land are called *altæ viæ regię*, so these public rivers, for public passage, are called *fluvii regales*, and *haut Streames le Roy*; not in reference to the propriety of the river, but to the public use."

Again he says, in chap. 8: "There be some streams or rivers that are private, not only in propriety or ownership, but in use, as little streams and rivers that are not of common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use, for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods, or both, from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they have come to be of private propriety, as in what part they are of the king's propriety, are public rivers, *juris publici*."

He makes no mention of prescription or length of time, by which the right is obtained, but of the actual use in fact, as indicating public rivers.

In *Wadsworth v. Smith*, 2 Fairf. 278, the doctrine is stated by Parris, J., that where a stream is naturally of sufficient size to float boats or mill logs, the public have a right to its free use for that purpose. But such little streams or rivers as are not floatable, that cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are wholly and absolutely private; not subject to the servitude of the public interest, nor to be regarded as public highways, by water, because they are not susceptible of use, as a common passage for the public.

The same principle was stated by Mellen, C. J., in *Spring v. Russell et al.*; and is also recognized in Angell on Tide Waters, 75; *Palmer v. Mulligan*, 3 Caines, 307.

The distinguishing test between those rivers which are entirely private property, and those which are private property subject to the public use and enjoyment, consists in the fact, whether they are susceptible, or not, of use as a common passage for the public. *Per* Spencer, C. J., in *The People v. Platt*, 17 Johns. R. 211; *Hooker v. Cummings*, 20 Johns. R. 90.

The right of passage and of transportation upon rivers not strictly navigable, belongs to the public, by the principles of the common law. *Per* Parker, C. J., in *Com. v. Chapin*, 5 Pick. 199.

This subject was very fully considered, and with great ability, in *Ersing v. McMaster*, in the Province of New Brunswick, 1 Kerr, 501, deciding the rule of law, as it is stated to be in *Wadsworth v. Smith*. The case of *Rowe v. Titus*, 1 Allen, 326, in that Province, was decided upon the same principle.

It is said, in *Adams v. Pease*, 2 Conn. 481, that the public have an easement in Connecticut River, above the flowing of the tides, for passing and repassing with every kind of craft, and that all rivers, above the tides, in reference to the use of them, are public, and of consequence subservient to public accommodation. Hence fisheries, ferries, bridges, and inland navigation are subject to the regulation of the government.

In Pennsylvania it is held, that the large fresh water rivers, in that State, are altogether public; not only their waters, but their beds. This conclusion is drawn from the inapplicability of the rule of common law to large rivers; also from the fact that neither the original proprietors nor the government have ever granted them to individuals. *Carson v. Blazer*, 2 Binney, 475; *Shrunk v. Schuylkill Nav. Com.*, 14 S. & R. 71.

If a stream could be subject to public servitude, by long use only, many large rivers in newly settled States, and some in the interior of this State, would be altogether under the control and dominion of the owners of their beds, and the community would be deprived of the use of those rivers, which nature has plainly declared to be public highways. The true test, therefore, to be applied in such cases, is, whether a stream is inherently and in its nature capable of being used

for the purposes of commerce, for the floating of vessels, boats, rafts, or logs. Where a stream possesses such a character, then the easement exists, leaving to the owners of the bed all other modes of use not inconsistent with it. For in this State, the rights of public use have never been carried so far as to place fresh-water streams on the same ground as those in which the tide ebbs and flows, and which alone are considered strictly navigable at common law, and to exclude the owners of the banks and beds from all property in them. In some of the States of the Union such a rule has been established by judicial decisions, and in others by legislative Acts.

It is contended, that to show Little River is public, it is not enough to prove that logs may be floated down at certain seasons of the year, when it is affected by a freshet, but that it should have that capacity in its natural and ordinary state at all seasons of the year.

In the test, which has been mentioned, to determine whether a stream should be considered public, none of the authorities, from which it is derived, requires the stream to possess the quality of being capable of use, during the whole year. A distinguishing criterion consists in its fitness to answer the wants of those, whose business requires its use. Its perfect adaptation to such use may not exist at all times, although the right to it may continue, and be exercised whenever an opportunity occurs. In many rivers, where the tide ebbs and flows, the public are deprived of their use for navigation during the reflux of their waters. A way, over which one has a right to pass, may be periodically covered with water. In high northern latitudes, most fresh-water rivers are frozen over during several months of the year. Even some tide waters are incapable of any beneficial use for purposes of commerce in the season of winter, owing to the accumulation of ice.

Every creek or river, into which the tide flows, it has been held in England, is not on that account necessarily a public navigable river. If it is navigable only at certain periods of the tide, and then only for a very short time, it is not to be supposed to be a navigable channel. Angell on Tide Waters, 89. Nor, as said by Shaw, C. J., in *Rowe v. Granite Bridge Corporation*, 21 Pick. 344, is it every small creek, in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a public stream, but it must be generally and commonly useful to some purpose of trade or agriculture.

But those authorities, upon which reliance is placed, show nothing more than that small creeks or inlets, penetrating into marshes, and which can only be used at certain periods of the tide, and then only for a short time, or in which there is only a possibility of use, under some circumstances, at extraordinary high tides, are not navigable

rivers. Such streams are incapable of any practical, general use for the purposes of navigation, and they are dissimilar to the river under consideration.

Most of the great rivers of this State, in some portions of their passage, are so much impeded by rocks, falls, and other obstructions that logs cannot be floated in them, any great distance, at what might be called an ordinary state of water. It is only in the spring and fall, and occasionally at other times, when their channels are filled with water, that they are capable of floating timber to market. They generally remain in this condition a sufficient length of time to answer the purposes of a common highway, and their fitness and character as such cannot be destroyed because they cannot be used in their ordinary state.

A test so rigid and severe, as that required by the instruction requested, would annihilate the public character of all our fresh rivers, for many miles in their course, from their sources towards the ocean. The timber floated upon our waters to market is of great value, and neither the law nor public policy requires the adoption of a rule, which would so greatly limit their use, for that purpose.¹

The right to the use of the stream in question must prevail whenever it may be exercised at any state of the water.

Another instruction requested to be given was, that "the plaintiff has no right to use the banks of this stream for driving logs, and if such use is necessary for driving logs, the plaintiff has no right to drive this stream."

This request is manifestly too broad, and could not, with propriety, be given. When the stream overflows its banks, it carries some of the timber with it, and when it subsides, the timber is left upon the uplands. But in such cases, the timber is not lost to its owners, who have a right by our law to enter upon the uplands and remove it. This subject has been regulated by Statute, c. 67, § 11, by which the owners of timber may enter upon the land and remove it, within a certain time, by tendering to the owner or occupier of the land a reasonable compensation for his damages. The banks of the stream may therefore be used for driving logs.

No request was made to instruct the jury, that if the stream was incapable of being used, without travelling upon its banks to propel the logs, there could be no public servitude in it.

The instruction given to the jury was, "that if it was necessary to go on the banks more or less, for the purpose of driving logs in Little River, that fact would not take from the stream its public character, if they found it capable, in other respects, of being used as a public stream." It belonged to the jury to determine whether the river possessed those requisites, which would give it the character of a public stream, and if they found it to be so, it could not be deprived of that character by the acts of those who might use it. In narrow

¹ See Gould, Waters, §§ 107-109.

places, it might at times be blocked up, or it might, as has been stated, overflow. The necessity of going upon the banks in such instances to effect a floating of the logs, would not prevent the river from being public. The inquiry related to the capacity on the river, and that could not be altogether decided, by what those using it might find necessary at times to do. Some might find it absolutely necessary, in their mode of driving logs, to commit trespasses on the adjoining lands, but their unlawful acts could not affect the stream, if it was really and intrinsically capable of public use.

If the plaintiff and others were in the habit of going upon the banks of Little River to drive their logs, it does not appear but that they might have confined themselves to its waters, though it might be more inconvenient for them so to have done. Their want of care in the use of the river, creating a necessity to commit trespasses, to relieve their property, would not prevent it from being public, nor justify the defendant in obstructing it. They would be responsible in damages for any trespasses committed.

The public are not entitled to tow on the banks of ancient navigable rivers, at common law. *Ball v. Herbert*, 3 T. R. 253. And where a river cannot be used without towing, or going upon its banks to propel what is floating, such fact would evince its want of capacity, in itself, for public use.

Sometimes the flow of rivers is broken by cataracts and falls, while in most of their course there is a smooth current, and they are of great utility in the transportation of property. Where such obstructions exist to so great extent, as to require the use of the shores, to carry property by them, though in those places they might not have a public character, yet for many miles above and below them they might be capable of a beneficial use for trade and commerce, and thereby be public. These obstructions may occur at long or short intervals, leaving other portions of the streams clearly public.

It is further contended by the defendant, that if the dam was an unlawful obstruction, the plaintiff had no right to run his logs through the defendant's sluice, built on his land, and recover damages for repairing it, although such course would be less detrimental than the destruction of the dam, but that he should have cut away the defendant's dam.

If a man has a right of way over another's land, unless the owner of the land is bound by prescription or his own grant to repair the way, he cannot justify going over the adjoining land, when the way is impassable by the overflowing of a river, but if public highways are out of repair or impassable, as by a flood, there is a temporary right of way over the adjoining land. 2 Black. Com. 36; 3 Kent's Com. 424.

Those obstructions, which prevent a passage, while they remain, are insurmountable.

It is said by Buller, J., in *Ball v. Herbert*, "that if a river should

happen to be choked up by mud, that would not give the public a right to cut another passage through the adjoining lands." The right of way is in the waters, and the defendant had no authority to prevent its exercise. He could, by law, erect and continue his dam and mills, but was bound to provide a way of passage for the plaintiff's logs. He obstructed the river improperly by his dam and logs. The plaintiff must either have left his property and lost its whole value, carried it by the dam, repaired the sluice and run the logs through it, or have removed such portion of the dam as would have afforded a passage. He adopted that course, which was least injurious to the defendant.

The plaintiff would have had the right to enter upon the defendant's land to remove the obstruction. *Colburn v. Richards*, 13 Mass. 420; *Inhabitants of Arundel v. McCulloch*, 10 Mass. 70.

The plaintiff might not be bound to repair the sluice, but having done so to obviate the difficulty created by the defendant, there does not appear to be any reason why he should be held to have taken that course, which would have produced a greater injury to the defendant. *Miller v. Mariner's Church*, 7 Greenl. 51.

The argument, that damages cannot be recovered for removing the logs, because the dam is alleged in the declaration to have caused the obstruction, cannot prevail, even if such construction should be given to it. For the dam stopped the water and retained the defendant's logs in his mill-pond. The removal of it would have allowed a free passage to the logs in the pond, as well as those of the plaintiff. The dam was the cause of the injury; its direct result was the detention of the water above it, and whatever might be in it. The necessity of a removal of the logs was a damage caused by the dam.

The defendant had a concurrent right with others in the use of the stream, but it appears that he transcended that right by filling his pond with logs, and refused to remove them upon request.

It may be difficult, in some cases, to draw the line between public and private streams. The jury have decided that Little River belongs to the former class, upon the exhibition to them of much testimony, by both parties. And there does not appear to be any sufficient reason why the verdict should be disturbed.

Both the motion for a new trial and the exceptions are overruled, and there must be judgment on the verdict.

D. T. Granger and *S. Greenleaf*, for defendant.

T. J. D. Fuller, for plaintiff.¹

¹ In *Hooper v. Hobson*, 57 Me. 273, it was held, that if persons drive logs in a stream by propelling them from the banks, they are liable for the actual damage caused to the riparian proprietors.

"It appears also that, in connection with these artificial aids to floatage, this small stream has been made a receptacle and channel for enormous quantities of logs not cut upon or near its banks, or those of streams furnishing access to it, but brought by rail from considerable distances, and forming no part of its natural burdens. In the case of public streams actually navigable, the right of floatage and navigation

HAROLD v. JONES.

SUPREME COURT OF ALABAMA. 1888.

[Reported 86 Ala. 274.]

CLOPTON, J.¹ The plaintiffs and defendants were engaged in the business of floating and rafting timber over the waters of the Sepulga creek, to the Conecuh river, and thence to Ferry Pass, Florida, which was the place of market. When the water in the creek was at low stage, the timber was prepared and placed in booms for safe keeping and preservation, until the water was in condition fit for floating. Plaintiffs' boom was above the boom of defendants. The defendants had several thousand pieces of timber in the creek, which had jammed, or, as the witnesses designate it, had formed "jacks." Early in July, 1887, the plaintiffs began to raft their timber, there being a rise of the water in the creek, and were delayed in reaching the point of destination by reason of the jams, which had to be broken. They claim that they were put to expense in breaking the "jacks," and that the price of timber declined during the delay, whereby they suffered damages, to recover which they bring this action. The *gravamen* of the action is, that the defendants obstructed the creek by the jams, and kept and continued the obstruction, whereby its navigation was destroyed for an unreasonable time. At the request of the plaintiffs, the court charged the jury, "that due diligence means enough hands to constitute force sufficient to break the jacks, if they were formed;" and refused to instruct the jury, as requested by defendants, that the law only required reasonable diligence to prevent the formation of "jacks," or to break or remove them when formed, "and if the evidence shows that defendants exercised reasonable and due diligence to prevent their formation, or to remove or break them after they were formed, then they are not guilty of obstructing the stream, so as to render them liable for damages in this action."

may be general. But the rule which makes private streams subservient to floatage is one which has been based on their natural surroundings, and rests on convenience, if not necessity. It is not competent to treat them as public highways for floatage from all quarters." CAMPBELL, J., in *Koopman v. Blodgett*, 70 Mich. 610, 617 (1898).

On the conflict of rights in a floatable stream between a log-driver and a riparian proprietor who wishes to use the water for power, see *Pearson v. Rolfe*, 76 Me. 380.

"There is a manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce, and those which are only capable of being used for the floatage of lumber and logs in rafts or single pieces. The riparian owners are entitled to the beneficial and sole use of the latter streams, except for floatage; and when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than in the case of a land highway which has been abandoned and is useless." MORSE, J., in *Grand Rapids v. Powers*, 89 Mich. 94, 111 (1891).

¹ The opinion only is given here.

By an act of the General Assembly approved April 19, 1873, Sepulga creek, and other streams in the counties of Conecuh and Escambia, "were made, constituted and declared to be public highways, for all the purposes of floating and rafting lumber, logs, and timber upon their waters." Acts 1872-73, 135. The right to use water-courses as highways, and the right to use highways upon land, are analogous, and depend on the same general principles. The general rule is not controverted, that an individual may maintain an action to recover damages, who has suffered special injury in consequence of obstructions to a highway, whether upon land or water, which constitute public nuisances. Any and all of the public have an equal right to the reasonable use of a highway; but the enjoyment by one necessarily interferes to some extent, for the time being, with its free and unimpeded use by others. No precise definition of what constitutes a reasonable use, adapted to all cases, can be laid down. Whether or not any particular use is reasonable, depends on the character of the highway, its location and purposes, and the necessity, extent and duration of the use, under all the attendant and surrounding circumstances. The general limitations upon the use are, that when it constitutes an obstruction to the highway, it must be of a partial and temporary character, justified by necessity and convenience, and in the ordinary and contemplated use of the highway. It must not be incompatible with the reasonable free use of others, who may have occasion to travel or transport over it, and the obstruction must not be continued longer than the continuance of the necessity and a reasonable time for its removal. On this principle, a builder may place the materials for an adjacent structure, or a merchant may place his goods in a street, to be removed in a reasonable time. Wagons, carts and other vehicles may stand in a highway, for the temporary purpose of loading or unloading. These are not considered unlawful obstructions to a highway upon land. The same principles are applicable and regulate the use of water-courses as highways. The right of transportation over a stream includes the right to make such uses of it as are essential to the exercise and enjoyment of the right to navigate and transport. Such a right has been held to include the right of anchorage, of mooring to wharves, and to moor logs and rafts for the purpose of making up or breaking the rafts, provided there is no interference with the rights of riparian proprietors. 81 Amer. Dec. 587.

The statute declares Sepulga creek to be a public highway, for the purpose of floating and rafting lumber, logs and timber. It is capable of this use only in periodical seasons of high water, and consequently is a public highway only during such seasons. While no one is justified in permanently obstructing the channel of the creek, temporary obstruction for the purpose of preparing and securing timber for future transportation, and necessary to the useful navigation of the creek at suitable seasons, does not constitute a violation of the rights of others, if such obstructions are in the customary and contemplated mode,

and are not unnecessarily and unduly continued. The construction of booms for this purpose appears to be customary and contemplated. If a boom is indispensable to a reasonable enjoyment of the creek as a public highway, and it is discontinued or removed in a reasonable time after the necessity for it ceases, its erection during a low stage of the water, when the creek cannot be used for floating or rafting, is not unlawful, and the boom does not constitute a nuisance, for which an action can be maintained.¹ The right to construct and extend a boom, for such purpose and at such time, carries with it the right to keep it extended a reasonable time. *Weise v. Smith*, 8 Amer. Rep. 621; *Graves v. Shattuck*, 69 Amer. Dec. 536.

Ordinary care consists in doing that which a reasonable, prudent man would do, or in omitting to do that which a reasonable and prudent man would not do, under the same circumstances in relation to the same subject-matter. *Matson v. Maupin*, 75 Ala. 312; *Davis v. Winslow*, 81 Amer. Dec. 573. By the charge given at the instance of the plaintiffs, the jury were instructed that, under the circumstances of this case, as disclosed by the evidence, due diligence required the defendants to have force enough to break the jams, if they were formed. This rule requires the defendant to keep force sufficient, at all times, to break jams as formed; or, at least, the jury would so understand the charge. The defendants have the right to a reasonable use of the creek, not only to raft their timber when there is sufficient water, but also to detain and keep it securely, when the water is at a low stage. If, in using the proper means for this purpose, jams were formed by the natural operation of the water, their removal in a reasonable time is the measure of the defendants' duty. The charge requires the exercise of a higher degree of diligence, than the law exacts; and being in general terms, without qualification, it was calculated to confuse and mislead the jury. Whether booms are necessary and customary to detain and preserve the timber, as also the time and reasonableness of the use of the creek by the defendants, and the removal of the jams in a reasonable time, were proper subjects for the consideration of the jury, to be determined from all the evidence and circumstances. It follows that, if the defendants had the right to erect and extend a boom, and to continue it a reasonable time, they were not wrong-doers, and did not cause an obstruction for which an action can be maintained, if they exercised due care and diligence to prevent the formation of jams, or to break and remove them when formed.

A party cannot recover for injuries caused by the negligence of another, if he himself has failed to exercise proper care, and his own negligence has proximately contributed to the injury. If it were established that the defendants unlawfully obstructed the creek, it

¹ See also *Brig "City of Erie" v. Canfield*, 27 Mich. 479; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 287. But a permanent boom in one of the Great Lakes is a nuisance if it obstructs navigation. *Union Mill Co. v. Shores*, 66 Wis. 476.

was the duty of plaintiffs to exercise ordinary care to avoid the consequences. *Lilly v. Fletcher*, 81 Ala. 234. If plaintiffs, knowing of obstruction, drove their rafts upon them without allowing defendants time to remove them, this would be contributory negligence, which would defeat a recovery for damages sustained by the loss of their timber in attempting to pass the obstructions; though, if they were prevented from rafting their timber to market by reason of the obstructions, which they were unable to pass, they might maintain an action to recover the natural and proximate damages resulting therefrom. Notwithstanding, the charge requested by defendant, in relation to contributory negligence, was properly refused, for the reason, that its hypothesis does not include all the elements of contributory negligence in such case.

*Reversed and remanded.*¹

¹ See *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 306; *Witheral v. Muskegon Booming Co.*, 68 Mich. 48, 58.

"The defendants, therefore, had the right to use the stream in a reasonable and proper manner for floating their logs. What is a reasonable use must depend upon a variety of conditions. If 'Shutting down the gates and holding the water, and discharging it in unusual quantities upon the drives below,' was an unreasonable use of the stream, and this unreasonable conduct 'forced the logs out upon the plaintiff's meadow,' the defendants are responsible for the damage thus occasioned. . . . But if the logs were cast upon the shore not by reason of an improper use of the stream, but by accident and without any fault of the defendants, they are not responsible at common law for the damage thus occasioned. Such streams, as well as our larger rivers, will, as experience has universally shown, from their windings and the rush of their waters, especially in times of freshets, cast floating logs upon the shores and banks. And the right of the public and of the defendants to the use of this stream for the purpose of floating their logs, involves the right of going upon the land of riparian owners for the purpose of reclaiming the logs that may have been washed ashore. Such incidental necessity neither enlarges nor diminishes the natural capacity of the stream, in a legal sense, nor in any way affects its public character. This right of pursuit and reclamation rests upon the same natural right as that which permits the owner of cattle to pursue into an adjoining field and recover his beasts straying from the highway; but in the pursuit and recovery of his cattle or his logs, the owner must do no unnecessary damage, and is responsible for any excess or abuse of his right. This right of reclaiming stranded logs is a common law right, a natural right, incident to the right of navigation." *FOSTER, J.*, in *Carter v. Thurston*, 58 N. H. 104, 107 (1877). *Forster v. Juniata Bridge Co.*, 16 Pa. 893, *semble*. But in *Sheldon v. Sherman*, 42 N. Y. 484, it was said that the log-owner may abandon his property without incurring liability, but if he elects to reclaim the strayed logs, he must pay actual damages to the land-owner. In Maine, the subject is regulated by statute. R. S., c. 42, §§ 7, 8.

B. Fishing.

1. TIDAL WATERS.

WARREN v. MATHEWS.

QUEEN'S BENCH. 1703.

[Reported 6 Mod. 73.]

EVERY subject of common right may fish with lawful nets, etc., in a *navigable river*, as well as in *the sea*, and the king's grant cannot bar them thereof; but the crown only has a right to royal fish, and that the king only may grant.¹

¹ In *Bagott v. Orr*, 2 B. & P. 472, the court said that as no authority had been cited to support a public right to take shells, "they should pause before they established a general right of that kind." In *Porter v. Shehan*, 7 Gray, 485 (1856), SHAW, C. J., said: "The defendant, in virtue of the common right of fishery in the sea and on the sea shore, had no right to take the soil, or fish shells, part of the soil, except as slight portions of the soil would necessarily and ordinarily be attached to shell fish, when taken. No such public right exists, to take the soil of flats belonging to the proprietor of upland bounding on the sea, to be used as manure, although some living shell fish may be mixed in it."

In some States the owner of the upland has the fee of the shore, — *Maine*: *Lapish v. Bangor Bank*, 8 Greenl. 85; *New Hampshire*: *Clement v. Burns*, 43 N. H. 609, 621; *Massachusetts*: *Anc. Chart.* 148; *Comm. v. Roxbury*, 9 Gray, 451, 514 note, *et seq.*; *Litchfield v. Scituate*, 136 Mass. 39; *Virginia*: *Code*, c. 101, § 5.

In other States the owner of the upland has the right to fill up front-lying flats, and the land filled in becomes his fee, — *Rhode Island*: *Providence Steam Engine Co. v. Providence Steamship Co.*, 12 R. I. 348, 368; *Connecticut*: *Chapman v. Kimball*, 9 Conn. 38, 41; *Mather v. Chapman*, 40 Conn. 382; *New Jersey*: *Revision, Wharves*, §§ 1, 2, 8.

"In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing. . . .

"It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.

"By the law of England, also, every building or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation.

"By recent judgments of the House of Lords, after conflicting decisions in the courts below, it has been established in England, that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river; and may recover compensation for the cutting off of that access by the construction of public works authorized by an act of Parliament which provides for compensation for 'injuries affecting lands,' 'including easements, interests, rights and privileges in, over or affecting lands.' The right thus recognized, however, is

WESTON v. SAMPSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1851.

[Reported 8 Cush. 347.]

THIS was an action of trespass *quare clausum fregit*, originally brought before a justice of the peace; and was submitted to the Court of Common Pleas, and, upon appeal, to this court, upon the following statement of facts:—

“It is admitted that the plaintiffs are the proprietors of the tract of upland described in their writ, with the flats adjoining at Powder Point,

not a title in the soil below high water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway. . . .

“The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only. . . .

“The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.” GRAY, J., in *Shively v. Bowlby*, 152 U. S. 1, 26 (1894).

Incidental Rights. The public right of fishery in tide waters gives no right to attach weirs or other fixtures to the soil of the foreshore. *Matthews v. Treat*, 75 Me. 504 (1884). Cf. *Lincoln v. Davis*, 68 Mich. 375 (1884).

In *Truro Corp. v. Rowe*, [1901] 2 K. B. 870, a right to lay oysters upon the foreshore temporarily to sweeten them was supported either as a common-law incident to the public right of fishery or as acquired by prescription in the particular case.

“Another point made on behalf of the defendants was that, in pursuit of their lawful calling, fishermen—not, be it observed, coming from certain villages, but all fishermen—are at liberty to use the soil above high-water mark, and in particular the soil of the Chesil Beach, for approaching or retiring from their boats, carrying their fish or otherwise. Much may be found in favor of this view in the old books, especially those which derive their authority from the civil law, and something in others of comparatively modern date, but the notion has never really found a place in our law of real property, the principles of which are decidedly adverse to it. . . . The next thing to be considered is one which, having regard to the evidence already mentioned, I must treat as also made on behalf of fishermen generally, and not on behalf of a particular class, and in truth the argument was conducted on that footing. It is said that fishermen are entitled, not merely under the pressure of peril or necessity, but always and at all times—that is, whenever it is convenient—to land on the beach and there to draw up and leave for future use their fishing boats. This would in practice be useless unless the right extended above at least ordinary high-water mark, and, seeing this, and the possibility of more difficult questions arising respecting the shore below that line, I suggested to the plaintiff's counsel that it would be as well to limit his claim to an injunction to the soil above it. . . . I see no answer to the plaintiff's claim thus limited.” KEENEWICH, J., in *Earl of Ilchester v. Raishleigh*, 61 L. T. R. 477, 478 (Ch. D. 1889). And see *Cortelyou v.*

so-called, in Duxbury, bordering upon the bay. The defendants, inhabitants of Duxbury, went in their boat upon said flats, and there, at low water, dug five bushels of clams, and put them into their boat, and

Van Brundt, 2 Johns. 367 (1807); *New England Trout & Salmon Club v. Mather*, 68 Vt. 388.

The right to dry nets on the adjacent shore is not a common-law right, but may exist in England by custom. Gray, *Perp.* § 577.

In the *Case of the Royal Fishery of the Banne* (1610), Davies, 149, it was resolved by the Irish judges "that the River Banue, so far as the sea flows and ebbs in it, is a royal river; and the fishery of salmon there is a royal fishery, which belongs to the king, as a several fishery, and not to those who have the soil on each side of the water.

"There can be no doubt but that there may be a prescriptive right in a subject to a several fishery in an arm of the sea." LORD KENTON, C. J., in *Mayor of Orford v. Richardson*, 4 Term R. 487, 489 (1791).

"The rule of law is uniform. In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides, and it generally extends *ad filum medium aque*. But in navigable rivers, the proprietors of the land of each side have it not; it is, *prima facie*, in the King, and is public. If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right; though the presumption is against him unless he can prove such a prescriptive right." LORD MAXFIELD, C. J., in *Carter v. Murcot*, 4 Burr. 2162, 2164 (1768). And see *Bagott v. Orr*, 2 B. & P. 472, 479 (1801).

"Anterior to Magna Charta, by which such grants were prohibited, a several fishery in an arm of the sea or navigable river might have been granted by the Crown to a subject." LORD CHELMSFORD, L. C., in *Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192, 209 (1865).

"The soil of 'navigable tidal rivers,' like the Shannon, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery *prima facie* in the public. But for Magna Charta, the Crown could, by its prerogative, exclude the public from such *prima facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by Act of the Crown not later than the reign of Henry II." WILLES, J. (delivering the unanimous opinion of the Judges), in *Malcomson v. O'Dea*, 10 H. L. C. 593, 618 (1863). See *Trustees of Brookhaven v. Strong*, 60 N. Y. 56.

"By these cases, we think the following propositions are well established: That by the Revolution, and by the acknowledgment of our independence by the British Government, the State of Massachusetts succeeded to all public rights of British subjects, whether originally belonging by prerogative to the Crown, or exercised and administered by Parliament in due course of law, that by the charter of the Colony of Massachusetts the people and settlers of the territory acquired not only the right of soil, but a right to the shores and arms of the sea, for all useful purposes of navigation and fishery; that since that charter no exclusive right of navigation or fishery, on the sea shores or in the bays or arms of the sea, could be acquired, except under the authority of the colonial, provincial or constitutional government, administered by the legislature by act or resolve; that though, perhaps, in the absence of such proof by act or resolve, such grant might be proved by adverse use and enjoyment, it must amount to that degree of exclusive occupation, sufficient to raise a belief that such act or resolve had actually been passed, though not now appearing; and, in general, this can only be done by showing an actual possession of the flats where the tide ebbs and flows, by building thereon or inclosing the same, so as to exclude the access of boats and vessels; that the common law, giving the rights of navigation and fishery to the public, remains in force in this state, except so far as it is qualified and restrained by the colony ordinance of 1647, giving to the

carried them away. The place where the defendants dug these clams was between high and low water mark, and within one hundred rods of the shore of the plaintiffs' upland. If the court shall be of opinion that the defendants had a right so to dig and carry away said clams, the plaintiffs are to become nonsuit; otherwise, the case is to be sent to a jury."

The arguments were made at Boston, in January, 1849.

H. A. Scudder and *T. P. Beal*, for the plaintiffs.

W. Baylies and *W. Thomas*, for the defendants.

The opinion was delivered at the October Term, 1849.

SHAW, C. J. The question in this case is probably one of very little importance to the parties in point of amount, but it presents a question

proprietor of the upland the fee in the soil, in flats flowed by tide water, to the extent of one hundred rods; but by the terms of that ordinance and the construction given to it, the rights of all the members of the community, to navigation and fishery in tide waters, on the shore and flats below high water mark, remain until the proprietor elects to build a wharf, or otherwise fill up and inclose such flats." SHAW, C. J., in *Lakeman v. Burnham*, 7 Gray, 487, 440 (1856). Cf. *Chalker v. Dickinson*, 1 Conn. 882 (1816).

In New Jersey it seems the right of fishery in the tidal waters of the Delaware is exclusive in riparian owners in front of their lands. *Fitzgerald v. Faunce*, 46 N. J. L. 538, 591 (1884); *Wilson v. Hill*, 46 N. J. Eq. 867 (1890).

Limit of the Foreshore. — In *A. G. v. Chambers*, 4 De G. M. & G. 206 (1854), the question was what is the limit of the title of the Crown to the sea-shore. ALDERSON, B., said (p. 215): "The same reason that excludes the highest tides of the month (which happen at the springs) excludes the lowest high tides (which happen at the neaps), for the highest or spring tides and the lowest high tides (those at the neaps) happen as often as each other. The medium tides, therefore, of each quarter of the tidal period afford a criterion which we think may be best adopted. It is true of the limit of the shore reached by these tides that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short, and on one day it is reached. This point of the shore, therefore, is about four days in every week, i. e., for the most part of the year, reached and covered by the tides. . . . We therefore beg to advise your Lordship that, in our opinion, the average of these medium tides in each quarter of a lunar revolution during the year gives the limit, in the absence of all usage, to the rights of the Crown on the sea-shore."

In *Reece v. Miller*, 8 Q. B. D. 626, GROVE, J., said (pp. 630, 631): "In order that the river may be tidal at the spot in question it may not be necessary that the water should be salt, but it seems to me that the spot must be one where the tide in the ordinary and regular course of things flows and reflows. There is no case which shows that because at exceptionally high tides some portion of the river is dammed up and prevented from flowing down, and so rises and falls with the tide, that portion of the river can be called tidal. . . . It seems to me that 'tidal navigable river' means that part of the river which under ordinary circumstances is tidal and navigable as such, and it is not enough to show that sometimes, under unusual circumstances, the river at the place in question is affected by the tide. For the purposes of the right claimed, the place must be one which may be fairly said to be within the influence of the ebb and flow of the tides in the ordinary course of things. It does not seem to me reasonable that, in every part of a river which may be affected by exceptionally high tides, and in which the water may be occasionally to some extent backed up in consequence, there should be a public right of fishing."

On the ownership of and rights in the foreshore of the several States, see the authorities collected by GRAY, J., in *Shively v. Bowlby*, 152 U. S. 1, 14 *et seq.*

of considerable interest to the inhabitants of the maritime districts of the State. The statement of facts is so shaped as to present the single question of the right of an inhabitant of Duxbury to enter upon the shore or flats, between high and low water mark, lying in front of land, the acknowledged property of another, and within one hundred rods of high-water mark, for the purpose of taking and carrying away clams therefrom.

The action is trespass *quare clausum*, and the facts find that the defendants did not pass over, or enter upon the plaintiffs' upland, but that they passed to the place from tide water in a boat, dug five bushels of clams, and placed them in their boat, and went away and carried the clams in their boat. It follows, of course, that they must have gone to the spot whilst the flats were so much covered with tide water as to float the boat, waited till low water, then dug the clams, and then waited until there was sufficient flood tide again to float their boat. This is the breach of the plaintiff's close of which they complain.

There is no doubt that by the common law of England all the subjects of the king have a common and general right of fishing in the sea, and in all bays, coves, branches, and arms of the sea, which in general is held to extend to all places where tide ebbs and flows. The general rule is expressed by Lord Hale, *De Jure Maris*, Hargr. Law Tracts, 11, that all the people of England have a liberty of fishing in the sea, as of common right, and of this they cannot be lawfully deprived, even by the grant of the king. *Carter v. Murcot*, 4 Bur. 2162; *Warren v. Matthews*, 1 Salk. 357. This was conceded by all the judges, although divided in opinion in other respects, in the case of *Blundell v. Catterall*, 5 B. & Ald. 268.

And it is not at all inconsistent with this common and general right that the king is held to be owner of the soil under the sea, which royal right, by the common law of England, extends over the shore where the tide ebbs and flows to ordinary high water mark. And it has been frequently held, that the king takes this right of soil in trust for the public, so far as the fishing is concerned; and although the king may grant away this right of soil to another, yet his grantee will take it subject to the same trust; and by such grant, however comprehensive in its terms, the public, that is, the king's subjects, cannot be deprived of their common right. This distinction between the *jus privatum* of the Crown and the *jus publicum* of the people is strongly stated by Lord Hale, *De Portibus Maris*, and is confirmed in recent cases of high authority. *Attorney-General v. Burridge*, 10 Price, 350; *Attorney-General v. Parmeter*, 10 Price, 378; *Parmeter v. Attorney-General*, 10 Price, 412.

In some of the cases, it has been held that one may have an exclusive right of fishing in an arm of the sea; but this is not so *prima facie*, and must be proved by ancient grant. And it has been repeatedly held that such right cannot be founded on the king's grant, made within the time of memory; and that no such right could be conferred by authority of

the Crown under Magna Charta. 2 Bl. Com. 39; *Warren v. Mathews*, 6 Mod. 73; *Somerset v. Fogwell*, 5 B. & C. 884.

The right of fishing in the sea, and in bays, arms of the sea, and in navigable or tide waters, under the free and masculine genius of the English common law, is a right, public and common to every person. 3 Kent Com. (6th ed.) 418. The same doctrine is stated and enforced by a large citation of authorities in 2 Dane Ab. 690, and in Angell on Tide Waters (2d ed.), 125 *et seq.*

In stating the principles, that by the common law the right of fishing may be public, although the soil in which it is used is private property, it is proper to add, that this public right may be regulated and abridged by the legislature, who have the control and guardianship of all public rights. In England this is often done by Act of Parliament, regulating ports and harbors, and authorizing wharves, docks, and other erections, which to some extent may abridge the public right of fishing. This is usually done in consideration of greater public good expected from such enclosures. *The King v. Montague*, 4 B. & C. 598.

This common and general right of fishing in the sea and its shores, at common law, being established, we think it is equally well determined by the authorities, that this right extended to shell-fish, as well those which are embedded in the soil as those which lie on the surface. *Bagott v. Orr*, 2 Bos. & Pul. 472; *Martin v. Waddell*, 16 Pet. 414; *Peck v. Lockwood*, 5 Day, 22.

Assuming that this was a common law right for all English subjects at the time of the emigration of our ancestors, we have no doubt, that by the charters of Charles I. and James I., under which the land of the colony of Massachusetts was granted, for the purpose of founding a colonial government of English subjects, all the rights to the sea and sea-shores, with the incidental rights of fishing, were granted to the colonists. It is unnecessary to inquire, whether the *jus publicum*, so far as general control and protection were concerned, remained to the Crown or not; all the right, both to the soil under the sea, as far as by the law of nations one government is conceded to hold an exclusive right to the sea-coasts, and to the shores and arms of the sea, where the sea ebbs and flows, did vest in the grantees under those charters. Whatever right or jurisdiction, if any, remained in the Crown after those grants, it is clear that it ceased on the establishment of independence, and has remained absolute in the States. *Pollard v. Hagan*, 3 How. 212; *Gough v. Bell*, 1 Zab. 156.

If, then, the right of fishing on the shores of the sea, including the right to take shell-fish from the soil, was a common law right, extending to the English colonies generally, and especially to Massachusetts, the question is, whether anything has been done by the colonial or provincial government, or by the government of the Commonwealth, to impair or abridge that right.

Though the laws of the colony of Plymouth have been published within a few years, we believe that they contain no provision bearing

on this subject. But the colony ordinance of 1641 is relied on, and we believe, mainly relied on, as giving to owners of land, bounding on tide waters, "propriety," or right to the soil, so far as the tide ebbs and flows, where it does not ebb more than one hundred rods. The premises, in which the trespass in this case is assigned, lie in the town of Duxbury, within the limits of the old colony of Plymouth, and were not within the territorial jurisdiction of the colony of Massachusetts, when the ordinance in question was passed; and therefore that ordinance, as positive law, did not, *proprio vigore*, extend to this territory. But the great principle established by the colony ordinance, extending the right of soil of the upland owner to low-water mark, has been held to extend by long usage to Maine: *Storer v. Freeman*, 6 Mass. 435; *Codman v. Winslow*, 10 Mass. 146; *Lapish v. Bangor Bank*, 8 Greenl. 85; to Plymouth: *Barker v. Bates*, 13 Pick. 255; and to Martha's Vineyard: *Mayhew v. Norton*, 17 Pick. 357; though all of these were under other territorial governments at the time the colony ordinance was passed. We have no doubt, therefore, that the plaintiff, as riparian owner, has the same proprietary interest in the soil as if it were within the old territory of Massachusetts.

But although the riparian proprietor has an interest in the soil, it is not an absolute and unqualified ownership; but so long as flats so situated are left open, unoccupied by any wharf, dock, or other enclosure, so long as the tide ebbs and flows over them, they so far retain their original character and remain public. This double rule, to which the territory lying between high and low water mark may be subject is not a novelty in the law, but an old and recognized principle. In *Sir Henry Constable's Case*, 5 Co. 107, it was held that when the tide was up, the place, and acts done upon it, were within the jurisdiction of the admiralty; when bare, being within the body of the county, the common law had jurisdiction. It is quite certain, we think, that the mere fact, that the *jus privatum*, or right of soil, was vested in an individual owner, does not necessarily exclude the existence of a *jus publicum*, or right to the fishery in the public. The rule, established by usage and judicial decision, has been, that although the ordinance transfers the fee to the riparian owner, yet, until it is so used, built upon, or occupied, by the owner, as to exclude boats and vessels, the right of the public to use it is not taken away; but that whilst open to the natural ebb and flow of the tide, the public may use it, may sail over it, anchor upon it, fish upon it, and by so doing commit no trespass, and do not dispossess the owner. *Austin v. Carter*, 1 Mass. 231.

This court are therefore of opinion that where flats are left wholly open to the natural ebb and flow of the tide, unoccupied and uninclosed by the upland proprietor, the right of fishing on the part of the public is not excluded; and that the law, in this respect, makes no difference between shell-fish, and swimming or floating fish. See *Parker v. Cutler Milldam Co.*, 7 Shepl. 357.

The only remaining question is, whether there is any other Statute

provision in force, which may take away or change the right, claimed by the defendants, to take clams in Duxbury. By Rev. Sta. c. 55, §§ 11, 12, all persons are prohibited from taking oysters from their beds, unless by permits there specified, with an exception that every inhabitant may take oysters, without a permit, for the use of his family. The shell-fish taken in this case were not oysters, nor does it appear that they were not taken by the defendants for the use of their families. Section thirteen prohibits the taking of other shell-fish, but it is limited to certain towns, of which Duxbury is not one. It was a revision of former particular Acts. All these also contain a proviso that they shall not prevent any fisherman from taking any quantity of shell-fish he may want for bait, not exceeding seven bushels at one time.

With these views of the law, the court are of opinion, upon the facts stated, that the action cannot be maintained.

*Plaintiffs nonsuit.*¹

PACKARD v. RYDER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1887.

[Reported 144 Mass. 440]

TORT, for breaking and entering the plaintiff's close, in Bourne, and catching and carrying away from the waters within the plaintiff's premises ten trout. Trial in the Superior Court, without a jury, before *Brigham, C. J.*, who allowed a bill of exceptions, in substance, as follows:—

It was agreed that on April 8, 1886, the defendant landed upon the plaintiff's flats, having come thereto by water, and landing from his boat. Thereupon, the tide being out, the defendant walked along the narrow strip of land or soil between high-water mark and low-water mark, in part consisting of shingle and gravel, and also in part covered with sedge grass, for the purpose of fishing; and he did, while so standing or walking, fish; that he was forbidden by the plaintiff, but continued so to stand, walk, and fish, claiming the right to do so; that the waters facing said shore are the open, navigable, tidal waters of Buzzard's Bay; that the damage done to the plaintiff's close was small; and that the defendant walked at times, in fishing as aforesaid, within one hundred rods of high-water mark, but he at no time went above high-water mark.

On these facts the judge found for the plaintiff; and the defendant alleged exceptions.

C. F. Chamberlayne, for the defendant.

H. P. Harriman, for the plaintiff.

¹ See *Porter v. Shehan*, 7 Gray, 435; *Proctor v. Wells*, 103 Mass. 216.

HOLMES, J. It is now well settled that there is a public right to take shell-fish on the shore and flats below high-water mark and within one hundred rods of the upland, until the flats are enclosed by the proprietors. *Weston v. Sampson*, 8 Cush. 347; *Dunham v. Lamphere*, 3 Gray, 268, 271; *Lakeman v. Burnham*, 7 Gray, 437; 9 Gray, 526, 527; *Commonwealth v. Bailey*, 13 Allen, 541, 542; *Proctor v. Wells*, 103 Mass. 216; *Commonwealth v. Manimon*, 136 Mass. 456, 458. But the right to take shell-fish is asserted on the single ground that the general right of fishing extends to and includes it. *Weston v. Sampson*, and *Lakeman v. Burnham*, *ubi supra*. The cases cited show too plainly for further discussion, that, if there is a right to go upon flats and to disturb the soil for clams, *a fortiori* there is a right to pass over them for fishing, in the stricter sense of the word. The defendant did not set nets, or create any permanent obstruction, as in *Duncan v. Sylvester*, 24 Me. 482. *Exceptions sustained.*

FLEET v. HEGEMAN.

SUPREME COURT OF NEW YORK. 1835.

[Reported 14 Wend. 42.]

ERROR from the Queen's Common Pleas. Fleet sued Hegeman and two others in an action of trespass in a justice's court, for taking and carrying away 2000 oysters, the goods and chattels of the plaintiff. The defendants pleaded the general issue. The cause was tried by a jury, and a verdict found for the defendants, on which the justice rendered judgment. The plaintiff sued out a *certiorari*, returnable in the Common Pleas of Queen's; which court affirmed the judgment of the justice. Whereupon the plaintiff removed the record into this court by writ of error. From the return of the justice, it appeared that the plaintiff had an oyster-bed in Oyster Bay, in Queen's County, of the extent of about 4 or 5 square rods, enclosed with stakes, at the distance of about 15 rods from the shore, opposite land owned by him or by his father. About two years before the trial, which took place in November, 1833, the plaintiff put into this enclosure a quantity of very small oysters, picked up around the shores; and shortly previous to the trial, the defendants went into the bed enclosed by the plaintiff and raked up and took 600 or 700 oysters, worth from ten to eleven dollars. Five or six years previous to the trial, oysters were plenty in the bay; but since then, they were not to be found, except where they were *planted*.

D. Rogers and *C. Bogert*, for the plaintiff in error.

S. A. Foot, for the defendants in error.

By the court, NELSON, J. It has before been decided that the right of fishing in this harbor or bay belonged exclusively to the inhabitants

of the town of Oyster Bay, derived by grant from the Crown of England. *Rogers v. Jones*, 1 Wendell, 237. In that case, Rogers was sued for a penalty created by a by-law of the town, declaring that "no person, not being an inhabitant of Oyster Bay, shall be allowed to rake or take any oysters in the creeks or harbors of the town, under the penalty of \$12.50 for each offence." He had entered the harbor or bay, and caught and carried away a quantity of oysters, about 100 yards from the beach; was a citizen of New York, but not an inhabitant of the town. The defence was put upon the ground, that the bay, being an arm of the sea where the tide ebbed and flowed, was a common fishery for all the citizens of the State, and that the inhabitants of the town possessed no exclusive right. The court decided that the grant to them by Sir Ed. Andros, under Charles II., invested them with that right, and sustained the by-law under which the penalty was inflicted. See also 6 Cowen, 376.

Both parties in this case probably are inhabitants of the town, and therefore are entitled to the common right of fishing in the bay. At all events, no question of the kind is raised in the case, and we assume such right belonged to the defendants. The plaintiff had gathered the oysters when small, some two years before the trial, and planted them in a bed in the bay, about fifteen rods from the shore; none grew there at the time, nor have any grown since outside of the bed. That a qualified property in the oysters was acquired by the plaintiff is admitted; but it is contended that the planting them in the bay, where a common right of taking them existed, was an abandonment of them to the public use. If so, it must be by force of law; for the case fully discloses that no such intent in point of fact existed. On the contrary, they were deposited there by the owner, to improve or rather give value to them, and with reference to an ulterior use. As to all inanimate things, an absolute property in possession may be acquired in them, — such as goods, plate, money; and if the article in question could be considered as falling within that description, there could be no doubt the defence taken would be untenable, unless there was an abandonment in fact. Oysters have not the power of locomotion any more than inanimate things, and when property has once been acquired in them, no good reason is perceived why it should not be governed by the rules of law applicable to inanimate things. But, it is contended, they fall within the rules of law applicable to animals denominated *feras naturæ*, the same as deer in the forest, pigeons in the air, or fish in public waters or the ocean. A qualified property is acquired in these by reclaiming and taming them; or by so confining them, within the immediate power of the owner, as to prevent their escape, and the use of their natural liberty. Deer in a park, hares or rabbits in a warren, or fish in private ponds or trunks, are instances of this description. These, it is said, are the property of a man no longer than while they continue in his keeping or possession. Manucapture is not necessary to acquire, much less to continue possession of this property. 3 Caines, 178. If

a deer or any wild animal reclaimed hath a collar or other mark put upon him, and goes and returns at pleasure, it is not lawful for any one else to take him; though if he be long absent, without returning, it is otherwise. In all these cases of wild animals reclaimed, the property is not absolute, but defeasible, by the animals resuming their ancient wildness, and going at large, — as if the deer escape from the park, or the fishes from the pond or trunk, and are found at large in their proper element, they become *feræ naturæ* again, and are free to the first occupant that may seize them. But while they continue the owner's qualified property, they are under the protection of the law, as much so as if they were absolutely and indefeasibly his; and an action will lie for any injury committed. 2 Black. Comm. 395, 6, 7; 3 Co. Lit. 294, note c., 7 Co. 86, *Case of the Swans*; 8 Vin. tit. Property, B.

It is clear, from the principles and cases above mentioned, that the right to appropriate property of the description in question does not depend exclusively upon the place where they are found, but upon the fact that they are *feræ naturæ* unreclaimed; for though the deer should be found browsing in his own forest, and the pigeon flying in the air, or any of the class reclaimable, at large, if they have been in fact domesticated and possess the *animus revertendi*, they are not common property, and the occupant who takes them gets no title; and if he takes them knowing their condition, he becomes a trespasser. This is clear upon well-settled authority. The right of the plaintiff to the oysters is within the reason of these principles. They have been reclaimed, and are as entirely within his possession and control as his swans, or other water-fowl, that may float habitually in the bay. They were distinctly designated according to usage; and, besides, the defendants had actual information of the ownership, and they can set up no greater right to take them, because found in their native element, than tame pigeons in the air, or a domesticated deer upon the mountain. If the bed interfered with the exercise of the common right of fishing, or if the oysters were undistinguished among others belonging to the public waters, the interest of the owners in them would undoubtedly be subservient to the enjoyment of the public use. But the exercise of that right in this case was a mere pretence. No oysters of the natural growth of the bay, fit for use, had been found there for years. The bed interfered with no other sort of fishing, for either profit or pleasure. The case presents a deliberate and wanton violation of property acquired by the industry and care of another, under the pretext of exercising a *right in common* which the defendants knew to be fruitless. We certainly would have regretted if the law had given countenance to such depredations, and we are rejoiced to find they are as gross a violation of the law as they are of the first principles of justice.

Judgment reversed.

2. NON-TIDAL WATERS.

CARSON v. BLAZER.

NISI PRIUS IN PENNSYLVANIA. 1807.

[Reported 2 Binn. 475.]

TRESPASS quare clausum fregit. The declaration stated that the defendants, "on the 10th day of April, 1803, with force and arms, &c., broke and entered the close of the plaintiff in the River Susquehanna, in the township of lower Paxton, in the county of Dauphin, and trod down his grass to the value of ten dollars there growing, and broke and entered into the *several fishery* of the plaintiff in the said river, in the township and county aforesaid, and then and there took 1,000 shad of the value of two hundred dollars, and other wrongs did, &c., to the plaintiff's damage three hundred dollars." Plea, Not guilty, with leave to justify.

On the trial before the Chief Justice at Harrisburg in April, 1807, the plaintiff deduced a title to himself from the late proprietaries, by warrant of 24th September, 1736, for 228 acres of land adjoining the Susquehanna, and immediately opposite to the fishery in question. The patent under which he held, stated the tract to begin at a birch tree *by the river*, thence by certain courses and distances to a red oak *by the same river*, and thence *by the same* the several courses thereof, to the place of beginning; no part of the land in the bed of the Susquehanna being expressly covered by the patent. The brother of the plaintiff, who was the former proprietor of the land, first cleared out a pool for a shad fishery between his own shore and a sand-bank in the river about 200 yards distant, in the year 1773; and afterwards fished there. Blazer, one of the defendants, made some further clearing in the pool near the sand-bank in 1796, and he and his sons fished in it from the sand-bank, at first without any opposition by the plaintiff; but he afterwards told them to desist, and brought the present action for drawing their seine in the pool, in the spring of 1803. There was but one pool or fishing place between the plaintiff's shore and the sand-bank. A net of the usual length would sweep the whole of it; and one of the witnesses swore that the defendants, in drawing their seine, came within fifteen or twenty yards of the plaintiff's shore.

Upon these facts the material question was, whether the plaintiff had an exclusive fishery in the Susquehanna opposite to his land, and on this point the Chief Justice charged the jury in substance as follows:

TILGHMAN, C. J. If the plaintiff has an exclusive right, it must be founded, either 1, on a grant from the late proprietaries; or 2, on prescription; or 3, on the principles of the common law adopted in this country.

1. King Charles the Second granted to William Penn the soil of Pennsylvania and the rivers within its limits, together with the fishing of all sorts of fish within the premises, and the fish therein taken. William Penn has not granted the plaintiff any right of fishery, nor has he granted him anything beyond the margin of the river. The proprietary asked no higher price for river lands than others. No doubt he retained the entire right of the river and of everything in the river, in order that he might make such use of it as would be most conducive to the public benefit; and he afterwards, at least as far back as the 9th of May, 1771, gave his assent to an Act of Assembly, declaring the River Susquehanna a highway, and regulating its fisheries in such a manner as to be inconsistent with an exclusive right in any person whatever. The *fourth* and *sixth* articles of William Penn's concessions are urged as a grant.¹ But it appears to me that these concessions are confined to the first purchasers; for there are several things therein agreed to be done by those first purchasers, which cannot be said to be binding on any subsequent purchasers. There are also other grants, as, for instance, to servants in the *seventh* article, which must be confined to the original emigrants; and there are stipulations and agreements in a great number of the articles, as in the 3d, 4th, 7th, 8th, 10th, 11th, 12th, 14th, 17th, 18th, and 20th, which must be limited in the same way. Now I give no opinion as to the rights of those first purchasers, and persons claiming under them. The plaintiff is not of that description.

2. No proof whatever has been given of anything like prescription, either in the plaintiff in particular, or in general in those persons who hold lands adjoining the Susquehanna. The first time the plaintiff used this fishery was in 1773, when he cleared away the stones which impeded his seine.

3. The plaintiff relies principally on that rule of the common law by which rivers, wherein the tide does not ebb and flow (which are *not navigable*), belong to the owners of the adjoining lands on each side. This common law right, if even it was properly applicable to the Susquehanna and Delaware, and other large waters, was not deemed proper for this country, nor was it adopted, up to the period of our Revolution; because, the several Acts of Assembly before that time, declaring these rivers to be highways, and regulating the fisheries in them, are incompatible with the common law right; and *since* the Revolution, no part of the common law has been adopted except that which was proper for our country. But the common law principle concerning rivers, even if

¹ Article 4th. That where any number of purchasers more or less, whose number of acres amounts to five or ten thousand acres, desire to set together in a lot or township, they shall have their lot or township cast together in such places as have convenient harbors or navigable rivers attending it, if such can be found.

Article 6th. That notwithstanding there be no mention made in the several deeds made to the purchasers, yet the said William Penn does accord and declare that all rivers, rivulets, woods, and underwoods, waters, watercourses, quarries, mines, and minerals (except mines royal), shall be freely and fully enjoyed, and *wholly*, by the purchasers into whose lot they may fall.

extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England, no such law would ever have been applied to it. Their streams, in which the tide does not ebb and flow, are small.

But there is another objection to the adoption of this principle. The common law gives to each proprietor one half of the river adjoining his shore; and if this doctrine is applied to the Susquehanna, every owner of the bank must own all the *islands* nearest to that bank, — a right never contended for.

The common law principle is, in fact, that the owners of the banks have no right to the water of *navigable* rivers. Now the Susquehanna is a navigable river, and therefore the owners of its banks have no such right. It is said, however, that some of the cases assert that by navigable rivers are meant rivers in which there is no flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches.

The inconvenience of common fisheries is urged. The only question is whether the plaintiff has an exclusive right; if he has not, he cannot recover. But in point of inconvenience, we are upon the same footing with the navigable waters of England: the public may make what regulations they please by law.

Upon the whole matter, I am of opinion that the owner of land on the banks of the Susquehanna has no exclusive right to fish in the river immediately in front of his lands, but that the right to fisheries in that river is vested in the State, and open to all; of course, that the plaintiff cannot recover.

The jury found a verdict for the defendants, and a new trial, which was asked for upon the ground of misdirection, being refused, the plaintiff appealed to the Supreme Court.

That court (YEATES, J., *dissenting*) refused a new trial, and ordered judgment for the defendants.

C. Smith and Duncan, for the appellant.

Hopkins, for the defendants.¹

¹ The opinions given in the Supreme Court are omitted.

See Gould, *Waters*, §§ 53-77.

So held as to a "floatable" stream. *Willow River Club v. Wade*, 100 Wis. 86 (1898).

"The common law has always recognized the right of the riparian owner to take fish in the waters running over his own soil, and appropriate them to his own use; but the fish being the common property of the people, such owner has never had the right to obstruct their passage from that portion of the river which flows over his land, nor has he the right to wantonly destroy the fish passing over it, and thus deprive the community of their right to and ownership in the fish, — hence the manner in which, the time when, and the amount such riparian owner shall take, for the

ALBRIGHT v. CORTRIGHT.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1900.

[Reported 64 N. J. L. 330.]

THE opinion of the court was delivered by

ADAMS, J. The declaration is in tort, and seeks damages from the defendant for breaking and entering the close of the plaintiff, being a tract of land covered with water in Stillwater township, in Sussex county, known as Swartwood pond, and for fishing and catching fish therein, in disregard of a notice by the plaintiff not to trespass on his land, and especially not to fish in said pond.

The gist of the defence is found in the following extract from the fifth plea, upon which issue has been joined: "That the said Swartwood pond has been stocked with fish by the fish commissioners of the State of New Jersey for twenty-five years, and that the fish therein belong to the public, and that the public for sixty years last past have entered the said close and openly, adversely, continuously, uninterruptedly and without molestation used the said close and waters of said Swartwood pond for the purpose of fishing for fish therein, and catching and taking fish therefrom, and that the defendant, as

preservation of the common property, is a legislative and governmental function. Government was organized to protect the general and collective rights of the governed as fully as the individual rights of each member of the body politic, — and this power, as we shall see, has been exercised as a legislative function by the British parliament almost from the time of its organization, as well as by our State governments since their organization." WALKER, J., in *Parker v. People*, 111 Ill. 681, 689 (1884).

"The first question which arises is, whether the provisions of Magna Charta and the other early statutes which were relied upon as prohibiting weirs were confined to navigable rivers; and that point was elaborately argued before us, and is discussed at large by the fishery commissioners in their judgment. We have carefully considered this point, and concur in the opinion expressed by the Court of Queen's Bench, that these statutes relate to navigable rivers only, and for the reasons which are fully stated in the judgment in the Court of Queen's Bench, and which it is therefore unnecessary to repeat." BOVILL, C. J., in *Leconfield v. Lonsdale*, L. R. 5 C. P. 667, 724 (1870). On the prerogative rights of the Crown in private rivers, see *Duke of Devonshire v. Pattinson*, 20 Q. B. D. 268.

"This common law right of several fishery in the owners of land bordering on rivers not navigable, is subject to a reasonable qualification, in order to protect the rights of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it, if their neighbors below them on a stream or river might with impunity wholly impede the passage of fish into the lakes or ponds, where they by instinct prepare for the multiplication of the species. This restriction is founded upon that universal principle of every just code of laws, *Sic utere tuo ut alienum non laedas*. Upon the same principle, that the exclusive property in the banks and bed of a river is subject to the public easement on the waters, the right of several fishery is limited to the taking of fish, but does not carry with it the right to hinder the passing of them above, that other owners may be prevented from enjoying a similar privilege." PARKER, C. J., in *Commonwealth v. Chapin*, 5 Pick. 199, 202 (1827). See also *Barker v. Faulkner*, 70 L. T. R. 24 (1896).

one of the public, has a right by prescription in and to the said close and the said Swartswood pond, and had at the time mentioned in the plaintiff's declaration a prescriptive right of profit in the said lands covered with water, and said Swartswood pond, being the same described in the plaintiff's declaration, and to fish into the said waters of said Swartswood pond, and to take, catch and carry fish therefrom without any hindrance or molestation of the said plaintiff."

At the trial the plaintiff proved both possession and title by deed in himself, before and at the time of the acts complained of, and that the defendant had fished in said pond, though notified by the plaintiff not to do so. The defendant then offered to prove that the pond had been stocked by the State of New Jersey about twenty-five years before, and that the public had continuously fished there for sixty years, which offers were denied, and a verdict for six cents was directed and rendered for the plaintiff. The questions presented by the exceptions are whether one who fishes in non-tidal water that covers land of another, though forbidden to do so by the owner of such land, can justify either by the long-continued usage of the public, or because the water has been stocked by the State of New Jersey. These defences, though blended in the special plea, are logically distinct.

Leaving out of view certain relations that are plainly foreign to this case, it may be said that whatever right, provable by user, the defendant could have had in the plaintiff's land must have been by way of easement, custom or prescription. The right that the defendant asserted was not an easement, which is a privilege without profit. Nor could he, as one of the public, acquire this profitable right by custom. In the first place, a common law custom, as distinguished from a usage of trade, must be immemorial, and this, in New Jersey, is impossible. *Ackerman v. Shelp*, 8 Halst. 125; *Allen v. Stevens*, 5 Dutcher, 509; *Ocean Beach Association v. Brinley*, 7 Stew. Eq. 438. In the next place, the right claimed is too comprehensive to be good by way of custom. "Custom is unwritten law established by common consent and uniform practice from time immemorial, and is local, having respect to the inhabitants of a particular place or district." 2 Greenl. Evid., § 248. This custom is laid in the whole public. A custom so general would be indistinguishable from the law itself, so that the question in such a case really is not whether the usage is customary, but whether it is lawful. *Fitch v. Rawling*, 2 H. Bl. 393. Finally, a profitable right in land of another cannot be gained by custom, but only by prescription. *Cobb v. Davenport*, 8 Vroom, 369; s. c., 4 Id. 223.

In view, no doubt, of these considerations the special plea alleges "a prescriptive right" in the defendant to which he is entitled "as one of the public." This proposition is unsound, because it conflicts with the rule that the public cannot prescribe. A right that a man claims merely as one of the public does not lie in grant, and therefore

not in prescription, which presupposes a lost grant, and so can embrace only things that are grantable. "A prescription," says Lord Coke, "always is alleged in the person." *Gateward's Case*, 6 Co. 60 b. "Prescription," says Sir William Blackstone, "is merely a personal usage: as that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege." 2 Bl. Com. 262. Mr. Greenleaf says: "Prescription is a personal right, belonging to one or a few persons by particular designation, as, for example, the owners of a certain parcel of land." 2 Greenl. Evid., § 248. To use a technical phrase, the claimant, in such a case, must prescribe in a *que* estate—that is, under or in the right of some other person or persons whose estate has come to him.

That a right to take profit from another's land cannot arise by custom was decided as early as *Gateward's Case*, *supra*. Lord Kenyon, in *Grimstead v. Marlowe*, 4 T. R. 717, said that the law had been so settled ever since the time of *Gateward's Case*. This is still the law of England. In *Goodman v. Mayor of Saltash*, 7 App. Cas. 638, 648, Lord Cairns says: "I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a profit *a prendre in alieno solo*. I think it also to be clear law that you cannot claim by prescription anything which could not have a lawful beginning. And I think it also clear that a fluctuating and uncertain body cannot claim a profit *a prendre in alieno solo*, and indeed cannot be the grantee of either a several fishery or of any other kind of real property." Two recent cases are *Blount v. Layard*, reported in a note to L. R. 2 Ch. Div. 681 (1891), and *Smith v. Andrews*, Id. 678 (1891). In the case first mentioned, Lord Justice Bowen, speaking of a part of the Thames that is above the reach of the tide, said: "Although the public have been in the habit as long as we can recollect, and as long as our fathers can recollect, of fishing in the Thames, the public have no right to fish there—I mean they have no right as members of the public to fish there. That is certain law. Of course, they may fish by the license of the lord or the owner of a particular part of the bed of the river, or they may fish by the indulgence or owing to the carelessness or good nature of the person who is entitled to the soil, but right to fish themselves as the public they have none."

The following extract is from the opinion by Mr. Justice North, in *Smith v. Andrews*: "The idea is sometimes entertained that the right to pass along a public navigable river carries with it the right to fish in it, but so far as regards non-tidal rivers this is not so. No lawyer could take that view. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it. Some few passages may be found in the books in which judges are reported to have said that subjects have a right to fish in navigable rivers, just as in the sea; but on investigation it always will be found that they

are referring to navigable rivers where the tide ebbs and flows and nothing else. . . . But even if the public had in fact fished in this water with less interference or interruption than was actually the case, it would not supply any defence to the defendant in the present action. Any acquisition of right arising from long continued use must be founded upon either custom, prescription or lost grant. It is well settled that the public cannot have any right to fish founded upon custom, however long the practice has continued. Upon this point it is not necessary to refer to various well-known and often-cited authorities. . . . Then can any such right be acquired by prescription? It is clear settled law that it cannot. . . . Lastly, as to any presumption of a lost grant, the observations of Mr. Justice Byles, in *Attorney-General v. Mathias*, 4 Kay & J. 579, are conclusive. There can be no presumption of a lost grant with respect to matter which cannot be the subject of prescription." To the same effect is *Constable v. Nicholson*, 32 Law Jour. C. P. 240, reported also with full notes in 8 Eng. Rul. Cas. 337. There are many American cases declaring the law to be as it is above stated, among which are *Waters v. Lilley*, 4 Pick. 145; *Pearsall v. Post*, 20 Wend. 111, 124, 125, and *Perley v. Langley*, 7 N. H. 233. The English law allows to the public no greater privileges in fresh-water ponds and lakes than in fresh-water rivers. This is evident from the cases collected in Gould Wat., §§ 79, 81.

The leading case in this state is *Cobb v. Davenport*, 3 Vroom, 369, decided by the Supreme Court on facts much like those now before us. The plaintiff claimed to own a natural, non-tidal lake in Morris county called Green pond. The action was trespass for breaking his close and fishing in water that covered his land. The defendant pleaded the general issue, denying that the plaintiff had an exclusive right to fish in said pond, set up the statute of limitations and license from the plaintiff and also alleged a prescriptive right to fish by virtue of certain grants to persons under whom the defendant claimed. A verdict was rendered for the defendant, which was set aside on rule to show cause. The Supreme Court held that the plaintiff had proved his title and that the defence, by way of limitation, license and prescription, was not sustained. Among the legal conclusions to be drawn from this case are these — that the soil under a fresh-water pond in New Jersey is not in the state but is in private ownership; that the exclusive right of fishing therein is *prima facie* in the owner of the soil but may be acquired separate from the ownership of the soil; that the right of the public to fish in private waters cannot be claimed by custom or established by proof of customary right, and that such right can be acquired only by grant or prescription and must be prescribed for in a *que* estate. The following extract from the opinion will show both how strong was the proof of user in that case and how closely the facts resemble those now in view:

"The evidence in this case shows that the public in general, for a period of forty years and upwards, were accustomed to fish in the pond in question without hindrance or molestation, and that permission to do so was neither asked nor granted; that the fishery was never used by its owners, either before or since the plaintiff acquired title, as a source of pecuniary profit, but that every one, without regard to residence or tenure of lands, was permitted to fish in all parts of the pond at will and whenever his inclination prompted him to do so, and that this privilege was exercised under a prevalent impression that the fishery, in the language of one of the witnesses, was a free fishery. And it is a noticeable fact in the case that although the witnesses who fished in the pond testify that they did so under a conviction of their right, yet no one claimed a right personal to himself or other than such as it was thought belonged to the public in general. This evidence tends merely to establish a customary right in all the inhabitants and frequenters in that locality to fish in these waters if a right to fish could be established by proof of custom. But the right of fishing being a profit *a prendre* in another's soil, as distinguished from an easement, cannot be claimed by custom but must be prescribed for in a *que* estate. The defendant cannot justify under a custom, nor will proof of a custom sustain a plea of prescriptive right because two rights, though they may co-exist in the same land, are of a completely different nature."

The defendant subsequently applied for leave to file an additional plea justifying the alleged trespass on the ground that the fishery had become public by dedication. Leave was granted in order that the question might appear on the record, and the plea was then, after argument, struck out. The opinion is reported in 4 Vroom, 223. The conclusions expressed by the court are that the right to fish and take fish *in alieno solo* is not an easement but is a profit *a prendre* and can be acquired only by grant or prescription, which must be pleaded; that such a right, so universal and unqualified as to subsist in the entire public, cannot be gained by custom or prescription, and that the doctrine of dedication to public uses does not embrace a claim of this character. The pleadings in the case now under consideration do not present the defence of dedication. The case of *Cobb v. Davenport* has been cited with approval by this court in *Attorney General v. Delaware and Bound Brook Railroad Co.*, 12 C. E. Gr. 631 (at p. 639), and in *Attorney-General v. City of Paterson*, decided at the present term, the exact point of the citation being, in each case, the tidal distinction between public and private waters.

It is plain from an examination of the authorities above referred to, and of many others that might be mentioned if it were worth while to multiply citations, that the Supreme Court, in *Cobb v. Davenport*, declared and enforced the ancient and established law. There is nothing in our local conditions which closely resemble those of England, or in the requirements of modern life that calls for the adoption

of a different rule. It may be true that there is here, as there seems to be in England, a common misapprehension on this subject, and that a good deal of fishing that is thought to be of right is only permissive. But it is not desirable to change an important rule of law merely because it is sometimes misunderstood. In country life a multitude of acts are habitually committed that are technically trespasses. Persons walk, catch fish, pick berries and gather nuts *in alieno solo*, without strict right. Good-natured owners tolerate these practices until they become annoying or injurious, and then put a stop to them. Little practical inconvenience results from this state of things, which the courts may well leave to regulate itself. Our conclusion, on this branch of the case, is that the trial judge did not err in excluding proof that the public had habitually fished in Swartswood pond.¹

The other ground of defence is that the state, some twenty-five years ago, stocked this pond with land-locked salmon, and that therefore the defendant, as one of the public, might fish in it. Inasmuch as evidence on this point was struck out, and the subsequent offer was not full, the facts relied on by the defendant do not appear as plainly as they otherwise might do. The waters of Swartswood pond, of course, escape and find their way to the ocean. It is not clear whether fish also may escape, or can enter from without, or even that salmon are now in the pond, or whether other kinds of fish are there. It is not distinctly shown that the defendant desired to catch salmon. He fished on two days and seems to have caught nothing. It is fair to assume, in favor of the defendant, that there were salmon in the pond, either placed there originally by the State of New Jersey or the successors of such; that they were desirable, and that the defendant would have been glad to catch them, and was at least attempting to do so. The fish thus introduced into this body of water must have been, at the dates of the alleged trespasses, the property of the plaintiff, or of the state, or of the public, meaning by the latter phrase that the public were at liberty to catch them where they lawfully might. If these fish were the property of the plaintiff,

¹ *Smith v. Andrews*, [1891] 2 Ch. 678. See *Turner v. Hebron*, 61 Conn. 175, 187, acc.

It seems that the Crown has no right of fishery in a lake not tidal. *Bristow v. Cormican*, 3 Ap. Cas. 641.

In *Marsh v. Colby*, 39 Mich. 626 (1878), the Court recognized the exclusive right of the land-owner to fish in a pond on his land, but also found a general practice to allow the public to fish in absence of a notice of prohibition.

As to the meaning of "boatable and other waters (not private property)," in which the constitution of Vermont gives a public right to fish, see *New England Trout & Salmon Club v. Mather*, 68 Vt. 388 (1896).

The public has a right to fish in the navigable waters and open bays of Lake Erie as in tide-waters at common law. *Sloan v. Biemiller*, 31 Ohio St. 492 (1878). In *Lincoln v. Davis*, 53 Mich. 375 (1884), it was held that there was a public right to attach stakes and other fixtures in aid of fishing to the soil at a distance from the shore of a Great Lake.

the second defence fails. The defendant sometimes calls them the property of the state, and sometimes the property of the public. If they were the property of the state, this defence fails, and the defendant could no more take them than if they were still in the hatchery. The third alternative is that they were for the public, and this is probably what is meant when they are called the property of the state. The question then is whether, on this branch of the case, the defendant can justify his acts by force either of common or statute law. He cannot do so by common law, for it is not true that a member of the community, merely as such, may enter the land of another in order to get at something that is devoted to the public. For example, highways and parks are devoted to the public, but one may not, therefore, cross another man's farm in order to reach them. Nor can the defendant prevail by virtue of the acts concerning fish and game, for the legislature cannot confer upon the public a general license to commit trespasses, and if it could do so no such intent will be implied, and the statutes do not express it.

The declared policy of the State of New Jersey is to promote and protect certain forms of animal life in the interest of sport and to increase the supply of food. To these ends non-tidal waters have been stocked with fish, and woods and fields may be hereafter stocked with game. It may happen that gunners will then claim that they can cross lands against the protest of the owners, and will allege as their justification, in close analogy to this defence, that the birds which they seek were originally impressed by state authority with a special public character. No theory can be sound that would warrant such an invasion of private property in pursuit of private advantage. The trial judge did not err in overruling the second defence.¹

The plaintiff was entitled to the direction that the jury find a verdict in his favor for nominal damages. The judgment is affirmed.

For affirmance — DEPUE, VAN SYCKEL, GARRISON, LIPPINCOTT, GUNMERE, LUDLOW, COLLINS, BOGERT, NIXON, HENDRICKSON, ADAMS, VREDENBURGH. 12.

For reversal — None.

¹ On the right of access to a "great pond," see *Slater v. Gunn*, 170 Mass. 509.

SECTION II.

HIGHWAYS.

ABSOR v. FRENCH.

KING'S BENCH. 1678.

[Reported 2 Show. 28.]

TRESPASS. The defendant pleads, that there was a highway from such a place to such a place; that the plaintiff stopped the same so as he could not pass, and therefore he went over the plaintiff's close, doing as little harm as he could.

And held good upon demurrer; for if the way be so foul as is not passable, I may then justify the going over another man's close next adjoining.

*Judgment for the defendant.*¹

LADE v. SHEPHERD.

KING'S BENCH. 1735.

[Reported 2 Stra. 1004.]

UPON trial of an action of trespass a case was made, that the place where the supposed trespass was committed was formerly the property of the plaintiff, who some years since built a street upon it, which has ever since been used as a highway. That the defendant had land contiguous parted only by a ditch, and that he laid a bridge over the ditch, the end whereof rested on the highway. And it was insisted for the defendant, that by the plaintiff's making it a street, it was a dedication of it to the public; and therefore however he might be liable to an indictment for a nuisance, yet the plaintiff could not sue him as for a trespass on his private property. *Sed per CURIAM*, It is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil. So the plaintiff had judgment.²

¹ See *The Queen v. Ramsden*, E. B. & E. 949; *Daves v. Hawkins*, 8 C. B. (N. S.) 848.

² See *Peck v. Smith*, 1 Conn. 108

In *Goodtitle d. Chester v. Alker*, 1 Burr. 183 (1757), it was held that ejectment would lie for land, although there was a highway over it. See *Cincinnati v. White*, 6 Pet. 481, *contra*, criticised in 2 Sm. L. C. (8th Am. ed.) 170-172.

DOVASTON v. PAYNE.

COMMON PLEAS. 1795.

[Reported 2 H. Bl. 527.]

REPLEVIN for taking the cattle of the plaintiff. Avowry, that the defendant was seised in fee of the *locus in quo*, and took the cattle damage feasant. Plea, that the *locus in quo* "lay contiguous and next adjoining to a certain common and public king's highway, and that the defendant and all other owners, tenants and occupiers of the said place in which, &c., with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and the said defendant still of right ought to repair and amend the hedges and fences between the said place in which, &c., and the said highway, when and so often as need or occasion hath been or required, or shall or may be required to prevent cattle *being in the said highway* from erring and escaping thereout into the said place in which, &c., through the defects and defaults of the said hedges and fences, and doing damage there. And because the said hedges and fences between the said place in which, &c., and the said highway, before and at the time when, &c., were ruinous, broken down, prostrated, and in great decay for want of needful and necessary repairing and amending thereof, the said cattle in the said declaration mentioned just before the said time when, &c., *being in the said highway* erred and escaped thereout, into the said place in which, &c., through the defects and defaults, &c." To this plea there was a special demurrer, For that it is not shown in or by the said plea, that the said cattle before the said time when, &c., when they escaped out of the said highway into the said place in which, &c., *were passing through and along the said highway*, nor that they had any *right to be there* at all, &c."

Williams, Serjt., in support of the demurrer.

Heywood, Serjt., *contra*.

LORD CH. J. EYRE. I agree with my brother *Williams* as to the general law, that the party who would take advantage of fences being out of repair, as an excuse for his cattle escaping from a way into the land of another, must show that he was lawfully using the easement when the cattle so escaped. This therefore reduces the case to a single point, namely, Whether it does not appear on the plea, to a *common intent*, that the cattle were on the highway, using it in such a manner as the owner had a right to do. from the words "*being in the said highway*?" This is a different case from cattle escaping from a close, where it is necessary to show that the owner had a right to put them there, because a highway being for the use of the public, cattle may be in the highway

of common right; I doubt therefore whether it requires a more particular statement. It would certainly have been more formal to have said that the cattle were passing and repassing, and if the evidence had proved that they were grazing on the way, though the issue would have been literally, it would not have been substantially proved. But I doubt whether the being in the highway might not have been traversed, and if the *being* in the highway can be construed to be certain to a common intent, the plea may be supported, notwithstanding there is a special demurrer, for a special demurrer does not reach a mere literal expression. The precedents indeed seem to make it necessary to state that the cattle were passing and repassing, but they are but few; yet upon the whole, I rather think the objection a good one, because those forms of pleading are as cited by my Brother Williams.

BULLER, J. This is so plain a case that it is difficult to make it a ground of argument. But my Brother Heywood says, there is a difference between trespass and replevin in the rules of pleading. In some cases there is certainly a material difference in the pleading in the two actions, though in others they are the same. One of the cases in which they differ, is that if trespass be brought for taking cattle which were distrained damage feasant, it is sufficient for the defendant to say that he was possessed of the close, and the cattle were doing damage: but in replevin the avowant must deduce a title to the close. Wherever there is a difference, it is in favor of trespass and against replevin; for in trespass an excuse in a plea is sufficient, but in an avowry a title must be shown. This brings me to the question, Whether the plea on this record be good to a common intent? Now I think that the doctrine of certainty to a common intent will not support it. Certainty in pleading has been stated by Lord Coke, Co. Lit. 803, to be of three sorts, viz., certainty to a common intent, to a certain intent in general, and to a certain intent in every particular. I remember to have heard Mr. Justice Aston treat these distinctions as a jargon of words, without meaning. They have, however, long been made, and ought not altogether to be departed from. Concerning the two last kinds of certainty, it is not necessary to say anything at present. But it should be remembered, that the certain intent in every particular applies only to the case of estoppels, Co. Lit., *ibid.* By a *common intent* I understand that when words are used, *which will bear a natural sense*, and also an *artificial one*, or one to be made out by argument or inference, the *natural sense shall prevail*: it is simply a rule of *construction* and *not of addition*: common intent cannot add to a sentence words which are omitted. There is also another rule in pleading, which is, that if the meaning of words be equivocal, they shall be taken most strongly against the party pleading them. There can be no doubt that the passing and repassing on the highway was traversable; for the question, Whether the plaintiff was a trespasser or not? depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers; and that

which is the gift of the defence must necessarily be traversable. A most material point therefore is omitted, and I think the plea would be bad on a general demurrer. But here there is a special demurrer, and as the words are equivocal, they are informal.

HEATH, J. The law is as my Brother Williams stated, that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public. On this plea it does not appear whether the cattle were passing and repassing, or whether they were trespassing on the highway; the words used are entirely equivocal.

ROOKE, J., of the same opinion.

*Judgment for the defendant.*¹

BATEMAN v. BLUCK.

QUEEN'S BENCH. 1852.

[Reported 18 Q. B. 870.]

TRESPASS for breaking and entering the close of plaintiff, in the parish of St. Sepulchre, in the county of Middlesex, and pulling down a wall of plaintiff in the said close.

First plea: Not guilty. Issue thereon.

Second plea: That the said close and the said wall were not, nor was either of them, the close or wall of the plaintiff. Issue thereon.

Third plea: That the said parish of St. Sepulchre, before and at the time of the passing of Stat. 57 G. 3, c. xxix., was a part of the metropolis included within the weekly bills of mortality; and the said close

¹ "There can be no easement, properly so called, unless there be both a servient and a dominant tenement. There is in this case no dominant tenement whatever. It is true that in the well-known case of *Dovaston v. Payne*, 2 Sm. L. C. 182, 6th ed.; 2 H. BL. 527, Mr. Justice Heath is reported to have said, with regard to a public highway, that the freehold continued in the owner of the adjoining land subject to an easement in favor of the public, and that expression has occasionally been repeated since that time. That, however, is hardly an accurate expression. There can be no such thing, according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement, it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities, or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement." *Per* LORD CAIRNS, L. J., in *Rangeley v. Midland R. Co.*, L. R. 3 Ch. 306, 310; 2 Foll. & Mait. Hist. (2d ed.) 44.

was, before and at the time when &c., a paved public place within the true intent and meaning and subject to the provisions of the said Act, that is to say, a public footway pavement which had been and then was paved, cleansed, and lighted under the authority of the Commissioners acting under Stat. 12 G. 3, c. 68; and that the said close was not at the said time when &c., nor was any part thereof, a turnpike road or any part of any turnpike road; and that, just before the said time when &c., the plaintiff had, contrary to the provisions of the first-mentioned Act, unlawfully laid in and upon the said public footway pavement divers bricks &c., and had therewith formed and constructed in and upon the said pavement the said wall in the declaration mentioned; and, because, at the said time when &c., the said wall remained on and incumbering the said public pavement, and because the plaintiff then, upon the reasonable request of the defendant, refused to remove the same, the defendant, at the said time when &c., entered upon the said close for the purpose of pulling down the said wall, and removed the bricks and other materials to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage: which are the same alleged trespasses &c.

Replication: That the said close was not, at the time when &c., a paved public place within the true intent and meaning and subject to the provisions of the said first-mentioned Act. Issue thereon.

Fourth plea: That, before and at the said time when &c., there was and of right ought to have been, into, through, over, and along the said close, a public and common highway for all the Queen's subjects to go and return, pass and repass, on foot, at all times, at their own will and pleasure; that defendant, before and at the said time when &c., was possessed of a dwelling-house abutting on and having a door opening into the said highway; and, because the plaintiff had wrongfully erected in and upon the said highway the said wall so near to the said door of the defendant as to obstruct the same, so that defendant could not, without prostrating the said wall, pass along the said highway into and from the said house, and because plaintiff, at the time when &c., refused, upon reasonable request of defendant then made to him in that behalf, to remove the said wall, defendant, at the said time when &c., entered upon the said close for the purpose of pulling down, and did pull down, the said wall &c. (justifying as in the third plea).

Replication: That there was not, nor of right ought to have been, into, through, over and along the said close, a public and common highway &c., as in the plea alleged. Issue thereon.

On the trial, before *Coleridge, J.*, at the Middlesex Sitzings, after last Easter Term, it appeared that the alleged close was a court opening into a public street in the parish of St. Sepulchre. There was no thoroughfare through the court. It contained fourteen or fifteen houses. The defendant was tenant of one of these houses, which had a door opening into the court, made by a previous tenant. The defendant had been required by the plaintiff to block up the door, which he

refused to do; whereupon the plaintiff erected the wall in question and thereby blocked up the door; upon which the defendant pulled the wall down. The wall was erected on the pavement of the court; and the court had been paved, at the request of the plaintiff, by the Commissioners under Stat. 12 Geo. 3, c. 68, and was lighted under the powers of the same Act. It was objected, for the plaintiff, that the third and fourth pleas were not proved, inasmuch as the court was not a public place within the meaning of Stat. 57 G. 3, c. xxix., and, not being a thoroughfare, could have no highway through it. The learned judge directed a verdict for the plaintiff on the first issue and on so much of the second issue as related to the wall, and for the defendant on the residue of the second issue, and on the third and fourth issues, with leave to move to enter the verdict for the plaintiff on the third and fourth issues.

Knowles, in last Easter Term, obtained a *ruli nisi* according to the leave reserved, and also to enter judgment for the plaintiff *Non obstante veredicto* on the third issue.

Montague Chambers and *Lush*, now showed cause.

Garth, contra.

LORD CAMPBELL, C. J. I am of opinion that the verdict upon the issue on the third plea was properly given for the defendant, inasmuch as the evidence went to show that the *locus in quo* was a public place within the Statute. But I am also of opinion that, upon this issue, the plaintiff is entitled to judgment *Non obstante veredicto*, inasmuch as the plea does not allege that the defendant enjoyed any right in the exercise of which it was necessary for him to remove the obstruction. He was bound, according to *Dimes v. Petley*, 15 Q. B. 276, and the cases there referred to, to show, not only that he had such a right, but that there was no way in which he could exercise it without the removal. On the issue raised by the fourth plea, I think the defendant is entitled to a verdict. That plea alleges that there was a public highway through the *locus in quo*, and that it was impossible for the defendant to pass along the highway without removing the wall. The jury found that there was such public highway; and we are bound to assume that finding to be good, unless, as is contended, there cannot, in law, be a highway through a place which is no thoroughfare. It seems to me that such a doctrine is incorrect. There may or may not be a highway under these circumstances. Take the case of a large square with only one entrance, the owner of which has, for many years, permitted all persons to go into and round it; it would be strange if he could afterwards treat all persons entering it, except the inhabitants, as trespassers. In *The Trustees of the Rugby Charity v. Merryweather*, 11 East, 375 n. (a), Lord Kenyon laid down that there might be a highway through a place which was not a thoroughfare, and seems to have left it to the jury whether there was such highway or not. In *Woodyer v. Hadden*, 5 Taunt. 126, the court did not decide that there could not be a highway under such circumstances, but only that in that particular case there was none; and I do not find anything decided there which

is necessarily inconsistent with what was laid down by Lord Kenyon. The fourth plea, therefore, being proved, and being unexceptionable on the face of it, the defendant is entitled to our judgment.

COLERIDGE, J. The third plea being given up, the question is, whether there was a highway through the *locus in quo*, as alleged in the fourth plea. It was proved that the court in question had one opening only into a public street; that it contained some fifteen houses, belonging to one person, but occupied by different tenants; that it was paved by the Commissioners at the request of the plaintiff, and had always been lighted by the parish. The jury found that there was a public highway through it; and I am of opinion, as I was at the trial, that there was evidence for them, both of a dedication to, and of a user by, the public. The finding, therefore, upon the facts, is satisfactory. But it is objected that there cannot, in law, be a highway through a place which is not a thoroughfare, and that, therefore, I was not justified in telling the jury that there might be a highway through the court, and leaving it to them to say, upon the evidence, whether there was or not. I cannot see any such legal impossibility as has been suggested. It is suggested that the way through such a place as this must be assumed to be for the use of the inhabitants only; but surely it is for the jury to say whether there has or has not been a dedication and user. More or less user may be proved according to the size and character of the place; but the principle does not vary.

ERLE, J. We are to say whether, in law, there can be a highway through a place which is not a thoroughfare. It seems to be clear, from the authorities, that there can; and I do not see any reason for holding that there should not. Whether, under the particular circumstances of each case, there is a thoroughfare, is a question for the jury.

CROMPTON, J., concurred.

Rule absolute for judgment Non obstante veredicto on third issue.

Rule to enter verdict for plaintiff discharged.¹

THE QUEEN v. PRATT.

QUEEN'S BENCH. 1855.

[Reported 4 E. & B. 800.]

On appeal against a conviction under Stat. 1 & 2 W. 4, c. 32, § 30, the Sessions stated a case for the opinion of this court. The case set out the conviction, of which the material part was as follows:

Berkshire, } Be it remembered that, on, &c., at, &c., Thomas Pratt, of,
to wit. } &c., is convicted before the undersigned, two of Her
} Majesty's Justices of the Peace in and for the said county,

¹ See *accord. People v. Kingman*, 24 N. Y. 559; *Bartlett v. Bangor*, 67 Me. 460. But cf. *People v. Jackson*, 7 Mich. 432.

for that the said Thomas Pratt did, on 11th October, A. D. 1854, at, &c., unlawfully commit a certain trespass by being in the day time of the same day upon a certain piece of land in the possession and occupation of George Bowyer, there, then and there in search of game, contrary to the Statute in such case made and provided. And we do adjudge that the said Thomas Pratt shall for the said offence forfeit the sum of £1, &c.

The appeal came on for hearing before the justices assembled at the General Quarter Sessions of the Peace, in and for the county of Berks, on the 2d of January, 1855; when, in support of the said conviction, it was proved by the said respondents that the appellant Thomas Pratt, on the 11th of October, 1854, about four o'clock in the afternoon, was on a public highway in the parish of Radley, carrying a gun, and accompanied by a dog; that the appellant waved his hand to the dog, and the dog entered the cover or plantation on one side of the highway (which cover or plantation is in actual possession and occupation of George Bowyer, Esquire); after which a pheasant rose and flew across the said highway; and the defendant, then being on the said highway, fired at the said pheasant so crossing the said highway twice, but did not kill it. The said highway is a common public road leading from Radley to Sunningwell, in the county of Berks; and George Bowyer, Esquire, is the owner of the land on each side of the highway, and also the lord of the manor. The land on one side of the highway is let by the said George Bower to one Stephen Mundy, who occupies it as a yearly tenant; but the said George Bowyer has reserved to himself the right of entering thereon at all times for the purpose of killing game. Upon hearing of the appeal, it was contended, by the appellant's counsel, that the evidence did not support the conviction, inasmuch as the appellant was on the highway at the time of the alleged trespass.

By consent of the parties, and under the order of Mr. Justice Coleridge (the further hearing of the appeal having been adjourned by the said justices), this case is now stated; and the question on which the opinion of the court is requested is: Whether the said conviction is supported in law by the evidence adduced on the part of the respondents as above set out.

Carrington, in support of the conviction.

Dowdeswell, contra.

LORD CAMPBELL, C. J. I am of opinion that this conviction should be affirmed. Stat. 1 & 2 W. 4, c. 32, § 30, enacts that, if any person, "shall commit any trespass by entering or being, in the day time, upon any land, in search or pursuit of game," he may be convicted. And then follows a proviso that "any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." Such being the enactment, the appellant Pratt is convicted of committing a trespass by being in the day time on land in the occupation of Mr. Bowyer; the facts proved in evidence are stated; and the question is asked of us, whether they support the conviction.

After considering the language of the enactment, I think that the Legislature contemplated that the offender must personally be or enter on the land. Had the words been only "commit any trespass on land in pursuit of game," I should have said that sending a dog upon the land was within the meaning of the words; but when I find the words are, "commit any trespass by entering or being, . . . upon any land," I think that the construction of the section is that there must be a personal entering and being on the land. Then comes the question, whether there was evidence to support a conviction for personally being on the land of Mr. Bowyer in search of game; and I think there was. We have the facts stated, that he was upon the highway carrying a gun, and accompanied by a dog; that he waved his hand to the dog, which entered the adjoining cover; that a pheasant rose; and he, being on the highway, fired at it, but missed it; that the highway is a public road; and that Mr. Bowyer is owner of the land on both sides, and in actual occupation of the land on one side of the highway. On these facts I think the magistrates were perfectly justified in concluding that Pratt was trespassing on land in the occupation of Mr. Bowyer, in search of game. He was beyond all controversy on land, the soil and freehold of which were in the owner of the adjoining land, that is, Mr. Bowyer. It is true the public had a right of way there; but, subject to that right, the soil and every right incident to the ownership of the soil was in Mr. Bowyer. The road, therefore, must be considered as Mr. Bowyer's land. Then Pratt, being on that land, was undoubtedly a trespasser if he went there, not in exercise of the right of way, but for the purpose of seeking game, and that only. If he did go there for that purpose only, he committed the offence named in the Act: he trespassed by being on the land in pursuit of game. The evidence of his being there for that purpose is ample. He waved his hand to the dog; the dog entered the cover and drove out a pheasant; and Pratt fired at it. The magistrates are fully justified in drawing the conclusion that he went there, not as a passenger on the road, but in search of game.¹ *Conviction affirmed.*

BAILEY v. JAMIESON.

COMMON PLEAS DIVISION. 1876.

[Reported 1 C. P. D. 820.]

THE first count of the declaration alleged that the defendants broke and entered lands of the plaintiffs at Bothal village, and broke down fences, and destroyed the herbage, &c. The second charged similar trespasses in Bothal Wood; and the third in Welbeck Wood.

Pleas, — 1. Not guilty, — 2, 3, and 4, a denial that the land, fences,

¹ The concurring opinions of the other judges are omitted.

and herbage in the first and second counts respectively mentioned belonged to the plaintiffs, — 5. To the first count, a claim of a right of way, — 6. To the first count, that the plaintiffs had unlawfully erected barriers, and the defendants removed them, — 7 and 8. Similar pleas to the second and third counts, — 9. Leave and license. Issue.

The cause was tried before Pollock, B., at the last Newcastle spring assizes. There was evidence that there had formerly been a public foot-way, though not a very convenient or much frequented one, through certain woods held by Bailey under the Duke of Portland, called respectively Welbeck Wood and Bothal Wood, leading from a place called Sheepcot Rectory to Bothal village; but that, in consequence of other ways which led to it having been stopped by orders of the quarter sessions in September, 1873, and March, 1874, there ceased to be any access to either end of it.

Upon this evidence a verdict was entered for the plaintiffs, damages 40s., upon each count, with leave to the defendants to move to enter the verdict for them, if the Court should be of opinion that, notwithstanding the impossibility of access to it, the way still continued to be a public highway.

A rule *nisi* having been obtained,

Herschell, Q. C. (*Gainsford Bruce* and *Ridley* with him), showed cause.

LORD COLERIDGE, C. J. The question in this case is now, as far as I know, raised for the first time. It is not doubted that the stopping of the roads by the orders of the quarter sessions was a proper act. Those orders were not appealed from. But it is said that an unexpected consequence has followed from that stoppage, and that raises the question which we have to determine. We must take it that the roads so stopped formerly opened into another road which was not in terms stopped by the justices. But, the access to both ends of that road having become impossible, it has lost its character of a highway which it had at the time of the stoppage. Now, it is admitted that there is no authority directly in point, — none at least has been found, — to show that a track retains the character of a highway where, by an act lawful in itself, the access to it has altogether been intercepted. We are driven, therefore, to decide this case upon principle. Now, the common definition of a highway that is given in all the text-books of authority is, that it is a way leading from one market-town or inhabited place to another inhabited place, which is common to all the Queen's subjects. Although there are no cases precisely in point, there have been some which will to a certain extent assist us, where it has been argued that a road one end of which had been lawfully obstructed ceased to be a highway, as in *Wood v. Veal*, 5 B. & Ald. 454, and *Rex v. Downshire (Marquis)*, 4 Ad. & E. 698. The conclusion to which the Court came in those cases was that the stoppage of one end did not make a road cease to be a common highway; for, though it thereby became a *cul de sac*, the public still might have a right to go over it to the end

and back. These cases do not decide the point now before us: still they assist us to this extent, that, to constitute a highway, there must be some notion of a passage which begins somewhere and ends somewhere, and along which the public has a right to drive or to walk from its beginning to its end. Here, that notion is entirely absent. By proper authority this way has become inaccessible at both ends. It remains a track which no member of the public can legally get upon, and therefore the defendants have failed to justify their presence there. If the defendants had a right to be there, though they got there by an act of trespass, they would not be trespassers for being there. It is necessary, therefore, to determine whether or not it remains a highway. I am of opinion that it does not. Its character of a public highway is altogether gone. The rule to enter a verdict for the defendants will therefore be discharged.

DENMAN, J. I am of the same opinion. The great difficulty here seems to arise from the familiar dictum "once a highway always a highway," and from the necessity of now for the first time placing a limitation upon it. But I think we are compelled to hold that this is a case where that which formerly was a highway, but which, though it has not been stopped by statutory process, has, by reason of legal acts at either end of it, ceased to be a place to which the Queen's subjects can have access, loses its character of a highway. The cases cited, and others to the same effect, show that where a public highway has, by reason of an Inclosure Act, or by other lawful means, been stopped at one end, and so converted into a *cul de sac*, it does not therefore cease to be a highway. But, where both ends are stopped, so that no one can have access to any part of it without committing a trespass, I see no difficulty in holding that it is no longer a highway. Dealing as we are with a short piece of foot-path, I do not think the arguments *ab inconvenienti* which have been urged by the defendants' counsel should weigh with us, so as to prevent us from coming to the logical conclusion that this way has ceased to be a public highway.

LINDLEY, J. I am of the same opinion. Mr. Herschell's argument amounts in substance to this, that there cannot be a public highway public access to which has lawfully been stopped at either end. I agree to that. At the same time I am desirous of guarding myself against being supposed to suggest that a public highway can legally be destroyed without resort to the proper statutory means.

*Rule discharged.*¹

¹ See *Dawes v. Hawkins*, 8 C. B. (N. S.) 848.

"If it ever had been a public way, it was then material to consider whether it had ever been discontinued so as to defeat the right of the public to use and enjoy it. This was also a question of fact. It was competent for the plaintiff to show, in proof of this issue, that the alleged way had been shut up, the land enclosed by permanent fences or walls, and occupied or improved for purposes inconsistent with its use as a public way, for a long series of years, and any other facts sufficient to found a legal presumption upon, that the way had been discontinued by competent authority. Such a presumption would stand on the same grounds as that of a non-appearing grant, or a lost record, and if properly supported by evidence would justify the jury

HARRISON v. DUKE OF RUTLAND.

COURT OF APPEAL. 1892.

[Reported [1893] 1 Q. B. 142.]

MOTION by the plaintiff in an action for assault for a new trial or to enter judgment for plaintiff on the claim. Cross-motion by the defendants for a new trial or for judgment on certain issues on the claim and on the counter-claim.

The pleadings, the event of the trial, and the facts, fully appear from the judgments, and are stated in detail in the judgment of Lopes, L. J.

The plaintiff in person.

Sir H. James, Q. C., and R. M. Bray, for the defendants.

Cur. adv. vult.

Dec. 8. The following judgments were delivered :—

LORD ESHER, M. R.¹ In this case the plaintiff brought his action against the Duke of Rutland and the other defendants, who acted by the Duke's authority, for assault and false imprisonment. The defendants justified, and, alternatively, brought into Court the amount of 5s., as being sufficient to satisfy the plaintiff's claim; and there was also a counter-claim by the Duke of Rutland.

The case came before the Lord Chief Justice for trial, when the jury gave a verdict for the defendants on the claim; and on the counter-claim the Lord Chief Justice directed a verdict for the plaintiff. The plaintiff appealed to this Court on the ground that the verdict for the defendants on the claim was wrong; the defendants also brought a cross-appeal against the Lord Chief Justice's ruling.

The main facts of the case are really not in dispute. The Duke of Rutland, with his friends, had a right to shoot on certain moors, and was on the occasion in question exercising that right. The plaintiff, from some perverted notion of desiring to interfere with the shooting, went on to a highway which crosses these moors, knowing that it was close to the place where the Duke and his friends were exercising their undoubted right. The land on both sides of this highway belonged to the Duke, and therefore the soil of the highway was vested in him. The plaintiff went on to this highway, not for the purpose of going to

in inferring that whatever was necessary to give legal effect and operation to a discontinuance of the way was rightly done." BIGELOW, J., in *Holt v. Sargent*, 15 Gray, 97, 101 (1880).

On the question whether public rights of highway may be lost by adverse user, see *Tiffany, Real Prop.*, § 365.

A custom in a borough, to enclose parts of the highway during fair-time, for booths, was sustained in *Elwood v. Bullock*, 6 Q. B. 383.

On the right of access of an abutter to the highway, see *Ramus v. Southend Local Board*, 67 L. T. R. 169.

¹ The opinion of Lopes, L. J., and passages in the opinions of Lord Esher, M. R., and Kay, L. J., dealing with questions of practice as to the counterclaim, are omitted.

or coming from any place, not for the purpose of using the highway as a highway at all, but merely for the purpose of using the highway itself in order to incommode the Duke and his friends and prevent the exercise of their right. He went on to the highway near the butts, towards which grouse were to be driven by the Duke's keepers, solely for the purpose of preventing the grouse from coming in the direction of the butts, and so interfering with the Duke's exercise of his right. He did so interfere by obvious means, such as waving his pocket handkerchief and opening and shutting his umbrella, for the mere purpose of keeping the grouse away. He was asked to desist, but he refused to do so. Thereupon the Duke's servants forcibly laid hold of him and held him down on the ground for the purpose of preventing him from interfering with the exercise of the Duke's right, until the drive was over and he could no longer interfere. They held him down only so long as was necessary for that purpose. That they did not do so with any unnecessary degree of violence seems to me to be clearly made out by the evidence. The defendants, as I have said, in case there was some excess, brought 5*s.* into Court, and they also pleaded a justification on the ground that the plaintiff was trespassing upon the Duke's land for the purpose of interfering with the Duke's enjoyment of his rights over his land; and that they used no more force than was necessary to prevent the plaintiff from doing so. There was therefore the issue on this plea of justification, and the other issue would be whether, assuming that the defendants had exceeded their rights in what they did to the plaintiff, the amount of 5*s.* was sufficient by way of damages. The jury found a verdict for the defendants on the claim. That was a general verdict, and it may have been that the jury thought that, if there was an excess of force used, the amount paid into Court was sufficient. The Lord Chief Justice, in his anxiety to maintain the rights of the public over highways to their fullest legal extent — an anxiety with which I fully sympathise — appears to me not to have taken into consideration certain matters in the case which should have been considered, and he directed the jury that, as a matter of law, the plaintiff was not trespassing on the highway, and therefore was not trespassing on the land of the Duke. Notwithstanding that direction, the verdict for the defendants on the claim is right, because, whichever way the case is looked at, the amount paid into Court may be sufficient, and it appears to me that it is. But the direction to the jury prevented the entry of a verdict for the defendants on the issue of justification, and the verdict has been entered on that issue for the plaintiff; and it prevented the entry of a verdict for the defendant, the Duke of Rutland, on the counter-claim, upon which accordingly the verdict has been entered for the plaintiff. The plaintiff appealed against the verdict for the defendants on the claim on the ground that it was against the evidence. I am clearly of opinion that that appeal cannot be entertained, because I think that, whichever way the case is looked at, the verdict of the jury on the claim was right. On the cross-appeal, the defend-

ants' counsel asked the Court to enter the verdict for the defendants on the issue on their plea of justification, and to enter a verdict and judgment for the Duke of Rutland on the counter-claim. As to the result in respect of a portion of what is asked for on the cross-appeal, I have no doubt. I think that the verdict should be entered for the defendants as regards the issue on the defendants' justification. And on the counter-claim, if it be asked for, I think there should be a verdict for the Duke for at the least nominal damages. I know that a claim to further relief was made in the counter-claim; but I will deal with that hereafter. The great difficulty to my mind in this case is to express the reasons for our judgment so carefully that we may not, in upholding the legal right of the owner of the land, interfere with the largest possible rights of the public to the enjoyment of the highway as such. The servants of the Duke in this case were no doubt taking a very strong course. The plaintiff was undoubtedly on a highway; he was not merely told to move on, but he was actually controlled and imprisoned for a time. That is a very strong measure, which ought to be employed with great care, and which puts the person who employs it in considerable jeopardy in a civil action. The plea of justification is founded on the allegation that the plaintiff was trespassing on the soil of the highway. The question is whether that is so. What is the true rule of law as to the user of a highway? It has been laid down in *Reg. v. Pratt*, 4 E. & B. 860. The Lord Chief Justice at Nisi Prius, where a judge cannot examine cases so closely as we can here, seems to have thought that the decision in that case depended in some way on its being a criminal case; but I think, if the judgments are examined, it will appear that the decision of that criminal case depended on whether the appellant was or was not a trespasser, and required the judges to say whether he had or had not committed a trespass. In that case the land in question was a highway, and the prosecutor was the owner of the soil. The appellant was charged with the offence of trespassing on land in pursuit of game. The foundation of that charge was a trespass. The appellant there, like the plaintiff in this case, did not go on to the highway for the purpose of using it as a highway at all; but he went on to it only for the purpose of searching for game. That is so stated by Lord Campbell, C. J. He said: "I think that the magistrates were perfectly justified in concluding that Pratt was trespassing on land in the occupation of Mr. Bowyer in search of game. He was beyond all controversy on land, the soil and freehold of which was in the owner of the adjoining land — that is, Mr. Bowyer. It is true the public had a right of way there; but, subject to that right, the soil and every right incident to the ownership of the soil was in Mr. Bowyer. The road, therefore, must be considered as Mr. Bowyer's land. Then Pratt, being on that land, was undoubtedly a trespasser, if he went there, not in the exercise of the right of way, but for the purpose of seeking game, and that only. If he did go there for that purpose only, he committed the offence named in the Act." So, if a man goes on to

part of a highway, the soil of which belongs to the owner of the adjoining land, not for the purpose of using such part of the highway as a highway, but only for some other purpose, "lawful or unlawful" — to use the words of Crompton, J., in the same case — he is in so doing committing a trespass against the owner of the soil. That case is founded on other cases which had gone before, and there are subsequent cases in which it has been followed. Therefore, on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser. But I must observe that I think that, if the language of Erle, J., and of Crompton, J., in *Reg. v. Pratt*, 4 E. & B. 860, were construed too largely, the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated *prima facie* for the purpose of passage; but things are done upon them by everybody which are recognized as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser. Again, I do not think that such a trespass can be made out, except where acts other than the reasonable and ordinary user of a highway as such have been done on that particular portion of the highway, the soil of which belongs to the owner alleging a trespass to his land. If a person is passing along a part of a highway which belongs to a particular owner, in order to do something beyond, on land which does not belong to that owner, then, so far as that owner is concerned, he is merely passing along that part of the highway, and, whatever it may be his intention to do further on, there would be no trespass as against such owner. Again, if a man is passing along a highway, only intending, so far as the highway is concerned, to pass along it, though he intends to go from it and goes into other land of the same owner, and does something contrary to his rights, I do not think that there will be any trespass on the highway. But the plaintiff in this case, it should be observed, was doing that which comes within what Lord Campbell, C. J., said in *Reg. v. Pratt*, 4 E. & B. 860, — he was using this part of the highway solely for the purpose of interfering with the rights which the owner of the land was exercising on another part of his land. He did not intend to go on the land of the Duke by the side of the highway, and thence interfere with the Duke's sport. He knew that would be a trespass. He stood on the highway, and walked up and down on it for the purpose of doing things which interfered with the Duke's enjoyment of his land near the highway. He was, therefore, not there for

the purpose of using the highway as such in any of the ordinary and usual modes in which people use a highway. Under those circumstances, I think that he was a trespasser. Cases might arise in which it would be a question whether what a person was doing was a reasonable and usual use of a highway. In such cases there might be a question for a jury as to whether such person was using the highway as a highway for passing, in accordance with the reasonable and ordinary user of it for that purpose. In this case, on the undisputed facts, it appears to me clear that the plaintiff was a trespasser, and, therefore, on the cross appeal, I think that the defendants are entitled to a verdict on the issue of justification. With regard to the counter-claim, I have the misfortune to differ to some extent from my learned brothers.

KAY, L. J. The soil of a highway belongs *prima facie* to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium filum* of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions. The only difficulty in applying them is in determining whether the particular act complained of is or not a user of the soil as a highway.

The legitimate use of a highway is generally described as a "right of passage," or a "right of passing and repassing." In 1 Rolle's Abridg. 392 B, pl. 1, 2, referred to and adopted by Lord Mansfield in *Goodtitle v. Alker*, 1 Burr. 133, at p. 143, the law as to highways is thus stated: "The King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil." In the last-mentioned case it was held that trespass would lie for any interference with the owner's rights in the soil of a highway, and that he may maintain ejectment for an exclusion as by a building upon the soil of the highway. In *Sir John Lade v. Shepherd*, 2 Str. 1004, an action of trespass was brought by the owner of the soil for building a bridge across a ditch, "the end whereof rested on the highway." The plaintiff had judgment, the Court saying: "It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil." Following these decisions, the grass or trees growing on the sides of the highway are held to be the property of the owners of the soil: *Turner v. Ringwood Highway Board*, Law Rep. 9 Eq. 418; *Curtis v. Kesteven County Council*, 45 Ch. D. 504.

The right of the public upon a highway is, in the language of the judges which I have quoted, described as a right of passage. In other cases it is defined as a right of passing and repassing. Probably this is sufficiently accurate and precise to enable any one to determine what in each particular instance is an improper use of the soil. Many

of such instances may be too trivial to justify any action or prosecution. That is so in the case of every trespass. If a man walks into the field of another without permission, he is a trespasser; but an action for such a trespass, unless it were in assertion of a fancied right, would not be very likely to succeed. So, if by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser. But no one in his senses would bring an action against him for an occasional trespass of that kind. There is no more danger of abuse of the law in the one case than in the other, and it is no argument against this well-settled law relating to highways to say that it is capable of such abuse. The answer is that the law of trespass, whether on the soil of a highway or on land over which the public have no rights at all, may be pushed to an extreme in certain cases. But the discretion of a Court of Justice is as capable of controlling any excessive assertion of right in the case of a highway as in any other case.

The other reported instances of trespass deserve consideration.

In *Dovaston v. Payne*, 2 H. Bl. 527, cattle were taken by the defendant damage feasant on his land, which adjoined to a highway. It was pleaded that, being on the highway, they had escaped into the land by reason of the owner not having kept the fence which divided it from the road in repair. The plea was held bad because it did not aver distinctly that the cattle were using the highway for the purpose of passing and repassing. So that they might have been trespassing upon it, and an escape from land on which they were trespassing would not be a defence. Heath, J., said that it was no excuse that the fences were out of repair if the cattle were trespassers, and it was necessary to show that they were lawfully using the road; for "the property is in the owner of the soil subject to an easement for the benefit of the public," and on the plea it did not appear "whether the cattle were passing and repassing, or whether they were trespassing on the highway." In *Stevens v. Whistler*, 11 East, 51, it was held by the Court of King's Bench that depasturing cattle upon a highway on one side of which the plaintiff had land was a trespass on that part of the soil of the highway which belonged to the plaintiff. In *Reg. v. Pratt*, 4 E. & B. 860, it was decided that a person who went upon the high road with a gun, and attempted to shoot a pheasant which flew over it, was properly convicted of a trespass in search of game under 1 & 2 Wm. 4, c. 32, s. 30, upon the soil of the highway which belonged to the owner of the close adjoining such highway. "He was on land," said Lord Campbell, C. J., "the soil and freehold of which was in the owner of the adjoining land. It is true the public had a right of way there, but subject to that right the soil and every incident to the ownership of the soil was in" the owner of the adjoining land. Wightman, J., said: "Though the public have a right to pass and repass on land which is a highway, they have no right to use the land for any other purpose than as a highway, and the appellant being on such land in pursuit of game was *prima facie* a trespasser." Erle, J., said: "It is said he could not be a trespasser be-

cause it was a highway. But I take it to be clear law that if, in fact, a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser like the cattle in *Dovaston v. Payne*, 2 H. BL 527." Crompton, J., said: "If a man use the land over which there is a right of way for any purpose lawful or unlawful other than that of passing and repassing he is a trespasser." These authorities were considered and followed by the Court of Queen's Bench in *St. Mary Newington v. Jacobs*, Law Rep. 7 Q. B. 47, where the law is stated thus: "The owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith." Mellor, J., who delivered the judgment of the Court, comments thus on *Reg. v. Pratt*, 4 E. & B. 860: "Whether or not that case is open to doubt as to the construction put upon the Game Act, it truly expresses, as we think, the true limit of the public rights over a highway." The Court held that the owner of premises adjoining a highway, who had offered to take up the flags of a footpath and replace them by hard materials to enable him to cart heavy machinery into his yard, was not liable for damage done to the flags by carting the machinery over them, when his offer had been refused.

According to these authorities, the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass. I understand those words to mean that the purpose need not be unlawful in itself; as for example, to commit an assault or a felony upon the high road. It is enough that it should be a user of the soil of the high road for a purpose other than that which is the proper use of a highway, namely, that of passing and repassing along it.

The peculiarity of the decision in *Reg. v. Pratt*, 4 E. & B. 860, is that the trespasser was passing along the highway, but his purpose in doing so made that passing a trespass. The purpose, however, was to do an act upon the highway itself which was beyond his right merely to pass and repass. If he had gone along the highway with the purpose of reaching a covert near the highway and taking game in that covert, though he might be a trespasser in that covert, I should not think he was a trespasser upon the highway. But, if a man goes along a highway for the purpose of cutting down the trees or bushes which grow along the side of it, or taking the grass, or setting up a show upon the highway, or doing upon the highway itself—in the words of Crompton, J.—any act "lawful or unlawful other than that of passing and repassing, he is a trespasser." The words must be read with the obvious qualification that the "purpose" they refer to must be a purpose of using the soil of the highway itself otherwise than by merely passing and repassing.

In this case the highway was a cart and carriage-road across a moor.

The Duke of Rutland had the right of sporting over the moor. The soil in it and in the highway, I understand, belonged to him. He had butts, in which people stood to shoot grouse driven over them from the moor. These butts were some two hundred yards from the road, so that shooting from them would not infringe the provisions of s. 72 of 5 & 6 Wm. 4, c. 50, which prohibits any person from wantonly firing off any gun within fifty feet of the centre of any carriageway or cart-way. Some old butts were within the prohibited distance. It was proved that the plaintiff went upon this high road during a grouse drive for the express purpose of preventing the grouse from flying towards the butts, and thus interfering with the right of sporting which was being exercised by the Duke's friends. On this point the evidence was so conclusive that we are told the Lord Chief Justice said it was superfluous to produce any more witnesses to prove it. The keepers seized the plaintiff, threw him down upon the road, and held him there during the grouse drive, to prevent his further interference.

Whatever may be thought of the so-called sport of standing in a butt and shooting at grouse driven over, it is not prohibited by law; and, subject to the provisions of the statute to which I have referred for the protection of wayfarers upon the high road, it is a not unlawful exercise of the right of the owner of the land.

The plaintiff went upon this highway, not for the purpose of exercising as one of the public his right of passage, but of interfering with the grouse drive by placing himself upon the soil of the highway so as to prevent the grouse from flying over the butts. In his own language, taken from his evidence, he says: "I certainly meant to take up my position in front of the butts": "I went there to defend the public right." With great deference, I am unable to agree that this was a use of the right of passing along the highway. I think it was an abuse of that right. In other words, it was a use of the soil of the highway for another purpose, which use interfered, and was intended to interfere, with a right which was then being exercised by the owner of the soil, and was incident to that ownership. Such a misuse of the soil of a highway is a trespass. There seems to have been sufficient evidence that the plaintiff was not only asserting a right to do what he did, but also that his intention was to repeat his interference. This strictly would entitle the defendants to the assistance of the Court by injunction to prevent a repetition of the act. But this is not pressed for; and I think that the defendants are entitled at any rate to a declaration under Order xxv., r. 5, upon their counter-claim, that under the circumstances the plaintiff, upon October 8, 1890, when stopped by the Duke's keepers, was trespassing upon the soil of the highway. I am not so much impressed with the consequences of granting an injunction. The Court exercises the power of enforcing such an order by imprisonment with very great care and caution.

The damages given to the plaintiff for the alleged assault upon him by the keepers on the assumption that he was not a trespasser were

only 5s. They would not be more on the ruling that he was a trespasser, and the defendants do not ask to alter the amount. The plaintiff's appeal fails, and must be dismissed. The defendants' appeal succeeds. Plaintiff's claim is dismissed with costs. The defendants' counter-claim is allowed with costs. *Judgment accordingly.*¹

PERLEY v. CHANDLER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1810.

[Reported 6 Mass. 454.]

THIS was an action of trespass for obstructing the plaintiff's watercourse in Winthrop, and filling up the same with logs, stones, and earth.

The defendant pleaded that the watercourse mentioned in the plaintiff's declaration was a nuisance in the highway in Winthrop, and that the abatement of that nuisance was the trespass alleged.

To this plea the plaintiff replied in substance, that he was seised of a close of land on each side of the highway, the one close on the north, and the other on the south side; and that he was possessed of a right of conducting water from the close on the north to the close on the south side of the highway, for the purpose of working certain mills belonging to him, and standing on the close last mentioned.

The rejoinder denied the right of the plaintiff to the watercourse, for the purpose mentioned in the replication, and on this right an issue was joined to the country.

Upon the trial of this issue, before *Sedgwick, J.*, at the last October term in this county, it appeared that one John Chandler formerly owned the two closes before mentioned, and that one Sampson Davis purchased the north close, bounded upon the road upon one side, and on the water upon the other side, by deed dated December 5th, 1798, with privileges through Chandler's land to his upper mill-pond or dam, for the purpose of conveying water where Chandler formerly conveyed it, or in any other place where Davis should think most convenient, and the privilege of digging a ditch into Chandler's mill-stream for the conveyance of water. Afterwards, on the 7th day of the same month,

¹ In the course of his opinion, *Lores, L. J.*, said: "The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public."

See *Hickman v. Maissey*, [1900] 1 Q. B. 752.

Davis purchased of Chandler the south close, which was bounded by the water on one side, and on the opposite side by the highway. On the 21st of January, 1801, Amos Perley duly levied an execution, issued upon a judgment in his favor against Davis, upon the two closes, and on the land between them, over which the highway was located; and on the 12th of April, 1803, the said Amos Perley, by deed of release, conveyed to the plaintiff in fee, the estate on which his said execution was levied. Upon these conveyances the plaintiff rested his right to the watercourse; he having also offered evidence to prove that he was in possession of the land described in Amos Perley's deed of release to him, at the time it was given.

It was agreed that the plaintiff, claiming a right to do it, made the watercourse, for the filling up and obstructing whereof he brought this action, to convey therein water from the close on the north side to the close on the south side of the highway, for the purpose of working his mills standing on the last-mentioned close, and that those closes were the same conveyed by Chandler to Davis.

A verdict was taken for the plaintiff by consent, subject to the opinion of the court, upon the facts, which are in substance above stated. And if the court should be of opinion that the plaintiff had the right put in issue, judgment should be rendered on the verdict so taken; and otherwise, that a verdict should be entered for the defendant, and judgment be rendered accordingly.

The cause was shortly argued at this term by *Wilde* for the plaintiff, and *Todd* for the defendant; after which the opinion of the court was delivered by

PARSONS, C. J. [After stating the pleadings and the facts.] There is a defect in the case. It is not alleged that John Chandler was seised of the land covered by the highway, which lies between the two closes; and although this land is expressly levied upon by Amos Perley's execution, yet it is not stated that the watercourse in question was sunk in this land, nor that the way had been previously laid out.

But taking it for granted, as John Chandler owned the closes adjoining on each side of the way, that he also owned the land over which the way passed; that it was the land described in Amos Perley's levy as covered by a way; and that the watercourse was sunk in this land, over which the way passed, we proceed.

By the location of a way over the land of any person, the public have acquired an easement, which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and freehold remain in the owner, although incumbered with a way. And every use to which the land may be applied, and all the profits which may be derived from it, consistently with the continuance of the easement, the owner can lawfully claim. He may maintain ejectment for the land thus incumbered; and if the way be discontinued, he shall hold the land free from the incumbrance.

Upon these principles, there can be no doubt but that the owner of

the land can sink a drain, or any watercourse, below the surface of his land covered with a way, so as not to deprive the public of their easement. And it is a common practice for the owners of water-mills, or of sites for water-mills, to sink watercourses for the use of their mills in their own land under highways, care being taken to cover the watercourses sufficiently, so that the highways remain safe and convenient for passengers.

These well-known legal principles are now to be applied to the case before us. The point saved is, whether the plaintiff had a right to sink the watercourse in question. And the decision of this point must depend either on the privilege he had in the soil of another, or on his right to make this use of his own soil.

The plaintiff, being an assignee of Sampson Davis, is entitled to the privilege purchased by Davis of John Chandler, by the first conveyance. But Chandler owning at that time the land under the highway, the privilege to dig a watercourse anywhere through his land must include a privilege to dig it under the highway, so that the easement remained to the public. On this ground the plaintiff had a right to dig the watercourse in question. But it further appears, from the extent returned on Amos Perley's execution, that the land under the highway was taken by the execution; and it also appears that Amos Perley conveyed that land to the plaintiff. If, therefore, the levy by Amos Perley was a disseisin of the right owner, yet, he not having since re-entered, the plaintiff has the freehold, subject, however, to be ousted or evicted by one who has the legal right.

But the defendant sets up no title to the land, and cannot therefore dispute the plaintiff's right to the soil. As to the defendant, the plaintiff must be deemed to be the owner; and as owner, he has the right to a watercourse in his own land under the highway; but so as not to deprive the public of the easement. And as the mere right in the plaintiff to the watercourse in question is the only point reserved, the plaintiff, having established this right, must have judgment on the verdict.

If the case presented to us a question, whether the owner of the land, over which is a public highway, might open a watercourse under the way, and leave it open at top, to the annoyance of passengers, some further considerations would be necessary.

If a highway be located over watercourses, either natural or artificial, the public cannot shut up these courses, but may make the road over them by the aid of bridges. But when a way has been located over private land, if the owner should afterwards open a watercourse across the way, it will be his duty, at his own expense, to make and keep in repair a way over the watercourse, for the convenience of the public; and if he should neglect to do it, he may be indicted for the nuisance; and upon the conviction, the nuisance may be prostrated by filling up the watercourse, if he shall not make a convenient way over it. This obligation upon the owner arises from the consideration, that when the way was located, the public were to be considered as purchasers of the easement,

by the payment to the owner of all damages which he sustained in consequence of the easement. And among other causes of damage might be estimated the inconvenience of opening a watercourse at his own expense.

Judgment on the verdict.

MAKEPEACE v. WORDEN.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1816.

[Reported 1 N. H. 16.]

THIS was an action of trespass. The declaration contained two counts, — 1. For breaking and entering the plaintiff's close, cutting his trees, and subverting the soil. 2. For taking, carrying away, and converting to the defendant's own use six cords of wood belonging to the plaintiff. By the statement of facts upon which the cause was submitted to the decision of court, it appeared that the *locus in quo* was a public highway in the town of Chesterfield, laid out through the plaintiff's land in 1801, that the defendants were employed by the town to make the highway, and that in making the road they necessarily cut sundry trees, which they afterwards carried away and converted to their own private use.

Handerson, for the plaintiff.

Upham, for the defendant.

PER CURIAM. In highways laid out through the lands of individuals in pursuance of Statutes, the public has only an easement, a right of passage; the soil and freehold remain in the individual, whose lands have been taken for that purpose. Towns whose duty it is to make roads and keep them in repair have a right to cut trees growing in highways so far as is necessary to the performance of that duty. It is therefore clear that the defendants are entitled to judgment on the first count in this case. Whether towns have a right to use trees thus cut, in the construction of the road, is a question not necessary to be settled in this case. The plaintiff complains, not that his trees have been thus used, but that they have been converted to the private use of the defendants. This complaint in our opinion is well founded and the plaintiff is entitled to judgment on his second count for the value of the wood.

*Judgment for the plaintiff.*¹

¹ See *Tucker v. Eldred*, 6 R. I. 404; *Suffield v. Hathaway*, 44 Conn. 521; *Stretch v. Cassopolis*, 125 Mich. 167.

CAMPBELL v. RACE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1851.

[Reported 7 Cush. 408.]

THIS was an action of trespass for breaking and entering the plaintiff's close in the town of Mount Washington, and was tried in the Court of Common Pleas, before *Byington, J.* The defendant pleaded the general issue, and specified in defence a right of way of necessity, resulting from the impassable state of the adjoining highway by obstructions with snow.

The defendant introduced evidence that at the time when the trespass was alleged to have been committed he was travelling with his team on a highway running east and west, which led to and intersected a highway running north and south, which latter highway led to and intersected another highway, on which the defendant had occasion to go with his team; and the usual, proper, and only mode of getting on which, by a highway, was by passing over the two highways first named, when they were in a condition fit for travel; but at the time of the alleged trespass they were both obstructed and rendered impassable by snow-drifts; because of which obstructions, the defendant turned out of the first highway with his team, at a place where it was rendered impassable as aforesaid, and passed over the adjoining fields of the plaintiff, doing no unnecessary damage, and returned into the second highway as soon as he had passed the obstructions which rendered both impassable. And he contended, that the highways being thus rendered impassable, he had a way of necessity over the plaintiff's adjoining fields, or that his so passing was excusable, and not a trespass.

But the judge ruled that these facts constituted no defence to the action; and a verdict having been returned accordingly for the plaintiff, the defendant alleged exceptions.

W. Porter and *J. C. Wolcott*, for the defendant.

I. Sumner, for the plaintiff.

The opinion was delivered at September term, 1852.

BIGELOW, J. It is not controverted by the counsel for the plaintiff that the rule of law is well settled in England that where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books. 2 Bl. Com. 36; Woolrych on Ways, 50, 51; 3 Cruise Dig. 89; Wellbeloved on Ways, 38; and it is fully supported by the adjudged cases. *Henn's Case*, W. Jones, 296; 3 Salk. 182; 1 Saund. 323, note 3; *Absor v. French*, 2 Show. 28; *Young v. —*. 1 Ld. Raym. 725; *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 M. & S. 387, 393.

Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law, and their practical application at an early period in this commonwealth, entitle his opinion to very great weight, adopts the rule as declared in the leading case of *Taylor v. Whitehead*, *ubi supra*, which he says "is the latest on the point, and settles the law." 3 Dane Ab. 258. And so Chancellor Kent states the rule. 3 Kent Com. 424. We are not aware of any case in which the question has been distinctly raised and adjudicated in this country; but there are several decisions in New York, in which the rule has been incidentally recognized and treated as well-settled law. *Holmes v. Seely*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Barb. 652. These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practised upon and acquiesced in, without objection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question, in our courts, and is a sufficient answer to the objection upon this ground, which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea-coast, severe and unforeseen storms not unfrequently overtake the traveller, and render highways suddenly impassable, so that to advance or retreat by the ordinary path is alike impossible. In such cases the only escape is, by turning out of the usually travelled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not

created, under such circumstances, sufficient to justify or excuse a traveller, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires that when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people should be entitled to pass in another line." It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person travelling on a highway is in the exercise of a public, and not a private right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim, which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional, and temporary use of land can be regarded as an appropriation of private property to a public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed that the right to the use of land adjoining the road was taken into consideration and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed, for the private injury which might thereby be occasioned.

It was also suggested that the Statutes of the Commonwealth, imposing the duty on towns to keep public ways in repair, and rendering them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law in this Commonwealth, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable for damages in those cases to which this rule of the common law would most frequently be applicable, — of

obstructions, occasioned by sudden and recent causes, which have not existed for the space of twenty-four hours, and of which the towns have had no notice. Besides, the Statute liability of towns does not extend to damages such as would ordinarily arise from the total obstruction of a highway, being expressly confined to cases of bodily injuries and damages to property. St. 1850, c. 5; *Canning v. Williamstown*, 1 Cush. 451; *Harwood v. Lowell*, 4 Cush. 310; *Brasley v. Southborough*, 6 Cush. 141.

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; *cessante ratione, cessat ipsa lex*. Such a right is not to be exercised from convenience merely, nor, when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveller, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed, which would justify or excuse the traveller. In the case at bar, this question was wholly withdrawn from the consideration of the jury, by the ruling of the court. It will therefore be necessary to send the case to a new trial in the Court of Commons Pleas. *Exceptions sustained.*

CODMAN v. EVANS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1862.

[Reported 5 Allen, 308.]

TORT to recover damages for the continuance of bay-windows, projecting from the defendant's dwelling-house so as to overhang the plaintiffs' land.

At the trial in the Superior Court, before *Rockwell, J.*, it appeared that the injury complained of was a continuance of the same injury for which a former action had been brought, between the same parties. 1 Allen, 443. The plaintiffs put in evidence the former judgment, and proved their title to the close described in the declaration; and the defendant proved his title to the adjoining close, and offered evidence to show that the portion of the plaintiffs' land over which the bay-

windows extended was part of a passage extending from Tremont to Avery and Mason Streets, open at both ends, and had been used as a common thoroughfare since 1811, and that the bay-windows did not interfere with its use as a highway. He also offered evidence to prove that it was and for nineteen years had been usual and customary in Boston to build bay-windows projecting over highways in a similar manner and to a like extent as that erected by him; and for more than sixty years to build balconies and other similar projections over highways, projecting as far as the bay-windows in question. But the judge rejected the evidence, and a verdict was returned for the plaintiffs. The defendant alleged exceptions.

G. O. Shattuck (*G. Putnam, Jr.*, with him), for the defendant.

C. A. Welch and *W. S. Dexter*, for the plaintiffs.

CHAPMAN, J. The parties are owners of adjoining lands, and the defendant's house stands on or near the line. The construction of his deed was settled in the former case between the same parties. 1 Allen, 443. He has erected a bay-window which extends beyond the line, over the plaintiffs' land, and maintains it there. The justification which he sets up in this action is, that there is a highway over the plaintiffs' land, extending to the line, and that his structure does not interfere with the use of the way. But this furnishes no legal defence. Nothing is better settled than that a highway leaves the title of the owner unaffected as to everything except the right of the public to make and repair it and use it as a way, and for some other public purposes, such as drainage and the laying of aqueducts; and that an adjoining proprietor has no more right to erect and maintain a permanent structure over the land than if no highway was there. A mere easement has passed to the public, leaving the fee in the owner. An adjoining proprietor may have occasion to use the way in connection with his land, in a different manner from other people. In *O'Linda v. Lothrop*, 21 Pick. 292, it was held that he might swing his gate or door over the way, suffer his horses or carriages to stand upon it, lay building materials upon it designed to be used on his land, and throw earth upon it as he removed the earth from his cellar. But these are all temporary acts, and are connected with the use of the way. He may spread earth upon it to make it more level and his access to it from his premises more convenient; but this is merely fitting it more perfectly to be used as a way. In *Underwood v. Carney*, 1 Cush. 285, the uses of the way which were held to be legal were of the same character as those in *O'Linda v. Lothrop*. They did not constitute permanent occupation; nor do those cases justify any occupation except for a reasonable time, and as connected with its use as a way. Here the occupation has been permanent, and having no connection with the use of the way.

The evidence of the alleged custom was rightly rejected. If there be a custom in Boston to erect bay-windows, balconies, and other structures over the streets, provided they do not interfere with the rights of

the public, by proprietors who own the soil of the street, such a custom has no application to the case. If it be a custom to erect them over the land of other people, such a custom is illegal; and the defendant cannot justify himself in occupying his neighbor's property as a part of his dwelling-house on the ground that such trespasses are customary in Boston. *Homer v. Dorr*, 10 Mass. 26; *Waters v. Lilley*, 4 Pick. 145. In some of our ancient highways the fee has always been in the town. Probably this is the case as to many of the streets of Boston. It does not follow from the decision of this case that the public could maintain an action like the present. There are also many cases where lands adjoining the highway have been so conveyed that, by our established construction of deeds, the fee of the land from the side line to the centre of the highway remains in the grantor, though both parties actually supposed it was conveyed. It is now too late to discuss the question whether it would not have been better to hold that all deeds bounding on the highway conveyed all the rights of the grantor as far as the middle of the way, as deeds bounding on streams extend to the thread. But in such cases, where there are no covenants such as are contained in the deed of Amory to Apthorp respecting the way, and defining the rights of the parties (see 1 Allen, 444), and where the grantor has no other land adjoining the highway to be affected by building a structure over the way, and can have no possible use of his fee so long as the highway exists, it does not follow from the decision in this case that he can maintain an action for the erection of such a structure. For in the present case the plaintiff not only has a right to have the whole space occupied by the street open, from the soil upwards, for the free admission of light and air, and the prospect unobstructed from every point, but it is a right of appreciable value in reference to himself and his grantees, who are proprietors of the other land adjoining the way. If the defendant may obstruct the light and air and prospect by means of a bay-window, he may by a much larger structure, and thereby greatly injure the property bounding on the street.

These views make it unnecessary to decide the questions argued as to the actual existence of the highway; because, if it does exist, that fact does not constitute a defence to the action.

Exceptions overruled.

MILLS v. LEARN.

SUPREME COURT OF OREGON. 1867.

[Reported 2 Oreg. 215.]

THE complaint alleges that a properly established highway runs through plaintiff's premises, and that the Umpqua River crosses said

highway on those premises; that defendant properly obtained a license to keep a ferry across that river, and the injuries complained of are that defendant used the banks of the Umpqua River, within the lines of the public road, as places for landing from his ferry-boats, and for tying up the same, without first obtaining permission; and wrongfully and unlawfully continued and threatened to continue so to use the said banks; that plaintiff never had received any compensation for such use. Plaintiff prayed for a decree enjoining defendant from committing such trespasses. Defendant demurred to the complaint for insufficiency, and after argument the court below sustained the demurrer and dismissed the complaint. Plaintiff appealed, and the cause stands on demurrer to complaint, and the error alleged in sustaining the same.

Kelsay and Watson, counsel for appellant.

W. R. Willis, counsel for respondent.

WILSON, J. At the December Term, 1853, in the case of *Grant v. Drew*, 1 Oregon R. 35, the Supreme Court of Oregon Territory decided several questions which arise in this case. Under the law then, the proprietor of the land adjoining or embracing any watercourse, over which a ferry might be established, had the preference, if he made application, over others, to keep the ferry. The present law, Code 869, § 42, declares not only a similar preference, but that no license shall issue to another unless, after notice of such application in writing, given to the riparian owner at least ten days prior to the term of court, such owner fail to appear and claim such license. That court declared that Grant, the riparian owner, had not the exclusive right to the ferry, and that he had failed to designate his preference to claim his right at the proper time, and it had been rightly conferred on another. After a full examination of the authorities, we here re-affirm the conclusions then made, that when a public highway crosses a stream of water it is not interrupted, but the water, and the soil beneath it, within the limits of the road, are a *continuous part* of the road; that when necessary for the proper use and enjoyment of the highway by the public, the ferries and bridges are also parts and parcels of the road. The present law provides for no terminations of a road, except the places of commencement and ending; the survey is continuous; if streams of water intervene, they are not deemed interruptions, for the survey continues over them as though they did not exist, and the distance is no greater or less by reason of their happening. Within the continuous limits, the public are entitled to have the way made safest for travel; to have hills lessened, forests removed, embankments made, and naturally impassable places made passable by bridge or ferry. From the varied adjudications hitherto on this subject, the general drift tends to the doctrine which we enunciate as the law in Oregon. Our Statute recognizes fully the rule in our Constitution, art. 1, § 18, and makes ample provision to compensate persons for those privileges, in respect to roads, which the public require. Public interests demand a safe and free right of travel through and over the whole length of

a highway. The owner of lands, through which it may pass, has been notified that the public requires its location. He is well aware of the place of entrance upon, and exit from his premises, and the general course thereon; of the necessity of a ferry or bridge he is certainly apprised; and with a full knowledge of the claim for a practicable road, of the acts needed to make it such, and of all the incidents therewith connected, he makes a claim for damages for the full and perfect location of the highway; and nowhere does the Statute contemplate a claim for partial damages. He knows the extent of injury; knows, too, that by Statute he stands secure of the right to keep any ferry on or adjacent to his lands, if he deem it of any sufficient value. It would be strange if, with all this knowledge, with these rights, he could afterwards say to the public that it had not compensated him for the privilege of using the ground at the edge of a stream in the road for the landing of those boats, which the competent authority deems best fitted for the convenience of the public. If his general claim for damages has been adjusted, or if he have failed to make such claim, we deem that he has received constitutional compensation for the laying out of the road, and all its incidents. He had, we affirm, no natural rights, except the right of landing upon the banks of the stream, and the right to a private ferry; certainly the claim for damages covers the former, and the latter is still his privilege, though a public ferry be established. The land under the water, as well as the land at the edge of the stream, is subject to the incumbrances of a highway, and their uses differ not; there is no line in a highway, on the different sides of which there are different rights or incumbrances. The franchise of a ferry rests with the State, and the right to locate a road is vested in the same authority, and both powers are jointly used in locating a highway, if necessary, and damages are claimed for the exercise of both, if claimed at all.

A brief reference to authorities sustains this view. In *Peters v. Kendall*, 6 Barn. & Cress. 708 (1827), the English courts held that the owner of the ferry need not have the property in the soil on either side; it was sufficient that the landing-place was a public highway; it was a right incident to the ferry to use such landing-place for the purposes of a ferry. Virginia authorities go very far that way. *Somerville v. Wimbish*, 7 Grat. 205; *Patrick v. Ruffner*, 2 Rob. 209. So *Mills v. Commissioners*, 3 Scam. 53; and from the collation of authorities, carefully made, Chancellor Kent, in the third volume of his *Commentaries*, note to page 421, declares this the better doctrine, that "this is the most reasonable conclusion upon the right to the use of a public highway to which a ferry is connected." The cases cited by counsel for appellant go mainly to this point, that a highway being established, and the public and the land-owner having acquired rights and privileges incident thereto, such use and such rights cannot be taken by a private or public corporation for particular purposes, or be diverted to other and inconsistent uses, without compensation for such appropria-

tion or diversion. To that doctrine we cheerfully subscribe; but those cases do not apply here. We deem the ferry a part of the road; without it, the road is useless, and the location has failed in its object. The landings are upon the highway and within its lines, and the distinction is a very shadowy one, between stepping from the land upon a boat, and from thence upon the land, and stepping from land to land, especially when all valuable rights are saved in other ways by our laws, perhaps as a part of a compensation to the land-owner. The owner of the land cannot go upon that landing and build abutments, or lay a wharf. Surely no diversion of use has been made, no appropriation different from the first great purpose of having a safe and speedy line for public travel and convenience. While this view decides the case in question, there is another feature which belongs specially to this case.

If the right to land from a ferry boat on a highway upon appellant's land was his own, and not to be taken without compensation, certainly the public has notified him that an appropriation of that right was demanded, and by as strict a course of procedure as in laying out a highway, he was notified that, upon a certain time it would be appropriated, unless he appeared and received that which would be in every view a compensation, viz.: The receiving of that franchise from the State which could only make the landing-place of any value to him; compensation was assessed and tendered then. The law declares that he shall be preferred. He has no right to have a public ferry in any way, without that franchise; the landing is to him of no value otherwise. If, then, conscious of that claim of appropriation to public use of his lands, he fail to appear and obtain, not only the value of landing from the stream, but also an exclusive ferry right, does he not waive any claim to compensation? Does he not declare that it is of no sufficient value to compensate him for the trouble of asking for his rights? Or, does he not consent that what might be of value to him, may be given to another? And no court would hold other than that he had consented to such use. In this case the full compliance with the law had been made, and appellant had suffered such a course when fully conscious of its effect. In either view we have taken, the judgment of the court below should be affirmed.¹

¹ See accord. *Clark v. White*, 5 Bush, 353 (1869); contra, *Cooper v. Smith*, 9 S. & R. 26 (1822); and *Prosser v. Wapello County*, 18 Iowa, 327 (1865). Cf. *Barrows v. Gallup*, 82 Conn. 493.

STATE v. DAVIS.

SUPREME COURT OF NORTH CAROLINA. 1879.

[Reported 80 N. C. 351.]

INDICTMENT for an affray tried at November Term, 1878, of Wake Criminal Court, before *Strong, J.*

The opinion contains the facts. That portion of the charge of the court to which exception was taken is as follows (the defendant and one Lassiter being on trial under the indictment): "Should the jury find that defendant Davis while in a public highway passing over lands of which Mrs. Laws was in possession, or while out of the highway but on such lands, used obscene, vulgar, and profane language, to the annoyance of men and women in the house of Mrs. Laws situated near by, and that defendant Lassiter was her son and lived in said house with his mother, and that he struck Davis for the purpose of suppressing said annoyance, and used no more force than was necessary for that purpose, you will find him not guilty." Verdict of Not guilty as to Lassiter, and Guilty as to Davis. Judgment, appeal by defendant.

Attorney-General, for the State.

Mr. T. M. Argo, for the defendant.

ASHE, J. The defendant and one Evans were quarrelling near the dwelling-house of Mrs. Laws in a public road running over her land. The defendant, armed with a pistol which he had in his hand, was vapor-ing, cursing, and using very vulgar language in the hearing of the inmates of the house. Lassiter, who was the son of Mrs. Laws and lived with her, came out with an ordinary walking-stick in his hand and remonstrated with the defendant, who, still holding his pistol, cursed and denounced him, saying he was in the public road, and he would curse as much as he pleased. After the interchange of a few words, the lie was given by defendant, and Lassiter struck him with his stick; when the defendant attempted to use his pistol, but was prevented by those present.

He seems to have rested his defence upon the ground that he was in the public road, and had the right to do there as he pleased. In this he was mistaken. The public have only an easement in a highway; that is, the right of passing and repassing along it. The soil remains in the owner, and where one stops in the road and conducts himself as the defendant is charged to have done, he becomes a trespasser, and the owner has the right to abate the nuisance which he is creating. The principle of *molliter manus* does not apply to a case like this, where the trespasser, armed with a pistol, is acting in such belligerent defiance. See *State v. Buckner*, Phil. 558.

The defendant used language which was calculated and intended to

bring on a fight, and a fight ensued. He is guilty. *State v. Perry*, 5 Jones, 9; *State v. Robbins*, 78 N. C. 431.

We find no error in the charge given by His Honor to the jury. Let this be certified, &c.

PER CURIAM.

*No error.*¹

CALLANAN v. GILMAN.

COURT OF APPEALS OF NEW YORK. 1887.

[Reported 107 N. Y. 360.]

THIS action was brought to restrain the defendant from obstructing the sidewalk in front of his store in Vesey street, New York city.

The material facts are stated in the opinion.

Henry Schmitt for appellant.

John E. Parsons and *Edwin M. Wight* for respondents.

EARL, J. The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers, and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects and maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto. A reference to a few cases will show what courts have said upon this subject.

In *Rex v. Russell* (6 East, 420), where the defendant, a wagoner, was indicted for occupying one side of a public street before his warehouse for loading and unloading his wagons, the court said "that it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage without necessity was a nuisance; that if the nature of the defendant's busi-

¹ See *Adams v. Rivers*, 11 Barb. 390.

ness were such as to require the loading and unloading of many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot." In *Rex v. Cross* (3 Camp. 224), the defendant was indicted for allowing his coaches to remain an unreasonable time in a public street, and the court said: "Every unauthorized obstruction of a highway to the annoyance of the king's subjects is a nuisance. The king's highway is not to be used as a stable yard. . . . A stage coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be provided for the coach to stand while waiting between one journey and the commencement of another." In *Rex v. Jones* (3 Camp. 230), the defendant, a lumber merchant in London, was indicted for the obstruction of a part of a street in the hewing and sawing of logs, and the court said: "If an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience should be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict, steady application of it. I cannot bring myself to doubt the guilt of this defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway with his lumber yard, and if the street be too narrow he must move to a more convenient place for carrying on his business." In *Commonwealth v. Passmore* (1 S. & R. 217), the defendant, an auctioneer, was indicted for a nuisance in placing goods on the foot-way and carriage-way of one of the public streets of the city and suffering them to remain for the purpose of being sold there, so as to render the passage less convenient, although not entirely to obstruct it, and the court said: "It is true necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But, inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. . . . I can easily perceive that it is for the convenience and the interest of an auctioneer to place

his goods in the street because it saves the expense of storage. But there is no more necessity in his case than in that of a private merchant. It is equally in the power of the auctioneer and the merchant to procure warehouses and places of deposit in proportion to the extent of their business." In the *People v. Cunningham* (1 Denio, 524), the defendants were indicted for obstructing one of the streets in the city of Brooklyn, and the court said: "The fact that the defendants' business was lawful does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway so as to impede the free passage of it by the citizens generally. The obstruction complained of is not of the temporary character which may be excused within the necessary qualifications referred to in the cases cited, but results from a systematic course of carrying on the defendants' business. It is said that this business cannot be carried on in any other manner at that place so advantageously either to individuals or the public. The answer to this is to be found in the observations of the court in *Russell's Case* (above cited). 'They must either enlarge their premises or remove their business to some more convenient spot.' Private interests must be made subservient to the general interest of the community." In *Welsh v. Wilson* (101 N. Y. 254), a case where the defendant obstructed a sidewalk in the city of New York with skids a few minutes while he was engaged in removing two large cases of merchandise from his store to a truck, in consequence of which the plaintiff claimed to have been injured while passing through the street, we said: "The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the cases of merchandise. Every one doing business along a street in a populous city must have such a right to be exercised in a reasonable manner so as not to unnecessarily encumber and obstruct the sidewalk." In *Mathews v. Kelsey* (58 Me. 56), the court said: "As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street) as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others."

Now what are the facts of this case? Both the plaintiffs and the defendant were extensive retail and wholesale grocers having stores near to each other on the south side of Vesey street in the city of New York; and a large portion of the plaintiffs' customers, in order to reach their store, were obliged to pass upon the sidewalk in front of the defendant's store. Goods were taken to and from the defendant's store by means of trucks loaded in the street. The trucks were placed in the street adjoining the sidewalk and then a bridge made of two skids planked over so as to make a plank way three feet wide and fifteen feet long, with side pieces three and a half inches high, was placed over the sidewalk with one end resting upon the stoop of the defendant's store

and the other end upon a wooden horse outside of the sidewalk near the truck to be loaded. This bridge was elevated above the sidewalk at the inner end about twelve inches and at the outer end about twenty inches, thus entirely obstructing the sidewalk, and goods were conveyed over this bridge to and from the store.

Persons wishing to pass upon the sidewalk in front of the store, when the bridge was in place, were obliged to step upon the stoop and go around that end of the bridge. The bridge was usually removed when not in use; but there was uncontradicted evidence that it was sometimes permitted to remain in position, when not in use, for ten or fifteen minutes, and that it sometimes remained in position when in use one hour, one hour and a half and sometimes even two hours; and the court found that the bridge thus remained in position across the sidewalk from four to five hours each business day between the hours of nine o'clock A. M., and five P. M., and that it obstructed the sidewalk the greater part of every business day. Such an extensive and continuous use of the sidewalk cannot be justified. It was a practical appropriation by the defendant of the sidewalk in front of his store to his private use in disregard of the public convenience. Even if in some sense such use was necessary to the convenient and profitable transaction of his business, and if the obstruction of the sidewalk was no more and even less than it would be by any other method of doing the business, these circumstances do not justify the obstruction. If the defendant cannot transact his extensive business at that place without thus encroaching upon, obstructing and almost appropriating the sidewalk during the business hours of the day, he must either remove his business to some other place or enlarge his premises so as to accommodate it. It was incumbent upon the defendant to show, not only that the use he made of the sidewalk was necessary in his business, but also that it was reasonable in reference to the public convenience. That it was unreasonable is too clear for dispute. He might use the bridge to load or unload a single truck, and this he could do at intervals during the day, at no one time obstructing the street for any considerable length of time. But there is no authority and no rule of law which would warrant such an obstruction daily for hours, or even one hour continuously. The defendant was, therefore, guilty of a public nuisance.

But the defendant claims that the plaintiffs did not allege in their complaint nor prove such special damage as entitled them to maintain this action. It is the undoubted law that the plaintiffs could not maintain this action without alleging and proving that they sustained special damage from the nuisance, different from that sustained by the general public; in other words, that the damage they sustained was not common to all the public living or doing business in Vesey street and having occasion to use the same.

The plaintiffs did not demand any damages in their complaint, and none were awarded to them by the judgment. They simply demanded

an injunction restraining the nuisance, and such was the judgment given to them. The complaint sufficiently alleges the special damages. It sets forth the location of the stores of the parties on the same side of the street, near to each other, the character of the bridge, which, when in use by the defendant, was only thirty-five feet from plaintiffs' store, and the manner and extent of the obstruction upon the sidewalk. From these facts alone, as they are fully set forth, it clearly appears that the plaintiffs suffered damage from the nuisance, which was not common to other persons having occasion to use the street. But the complaint goes still further, and distinctly alleges that the obstruction prevents "the plaintiffs and their employees or patrons and all persons from passing along said sidewalk to and from Church street, and to and from plaintiffs' said store, to the detriment and great injury of plaintiffs and their said business;" that the obstruction had been maintained for more than six months prior to the commencement of the action, on an average of five hours each day during the business hours of the day, "to the great and irreparable injury of the plaintiffs." While the complaint is not very definite as to the particular damage suffered by the plaintiffs and the extent thereof, there is enough to show that they suffered some special damage; and if the defendant was not satisfied with the complaint in these respects, he should have moved to make it more definite, or for a bill of particulars. The defendant having taken issue upon the complaint, and gone to trial, it must be held sufficient to warrant the proof given.

The facts proved and found show special damage from the nuisance to the plaintiffs. There was some proof that some custom was turned from the plaintiffs' store on account of the obstruction, and that pedestrians were turned to the north side of the street before reaching plaintiffs' store. That the plaintiffs suffered some special damage not common to persons merely using the street for passage is too obvious for reasonable dispute. Direct proof of the damage was not needed. All the circumstances show it.

It is further objected, on the part of the defendant, that some of the material findings of fact made by the trial judge were not upheld by any evidence. A careful scrutiny of the evidence fails to satisfy us that this objection is well founded. On the contrary, the undisputed evidence showed the nuisance, the special damage and the right of the plaintiffs to a judgment restraining such nuisance. The evidence of the defendant was directed mainly to show that the bridge was necessary in his business; that skids and other similar appliances were in common use by merchants in the city, and that he left a passage-way for pedestrians on and over his stoop. The alleged necessity, as we have shown, furnished the defendant no justification for the nuisance, and it may be conceded that similar appliances are quite common in New York. It is not the nature of this appliance that furnishes the basis of our judgment, but its unreasonable use. The defendant could not justify his unreasonable obstruction of the sidewalk by showing

that he allowed pedestrians to pass around or through his store or over his elevated stoop between moving barrels and packages. The stoop is no part of the sidewalk, and the defendant could not appropriate that to his private use and substitute his stoop for the public convenience. While temporarily obstructing the sidewalk, he should give pedestrians the best passage he can over his stoop. But this should be a temporary, not a permanent shift. He cannot justify the obstruction of the sidewalk for hours because he gives the public a less convenient passage over his stoop.

The trial judge refused to make any findings upon certain questions of fact submitted to him, and this is now complained of as error. It is the duty of the trial judge to find upon every material question of fact submitted to him and involved in the evidence. But his refusal to do so will not be an error fatal to his judgment if the findings asked were not material to the decision of the case, or would not be beneficial to the party asking them. Among the findings thus submitted on the part of the defendant were the following: "That the defendant uses the place complained of at a time and in a manner that is reasonable under all the circumstances;" "that the use of the sidewalk by the defendant does not unreasonably abridge or obstruct the passage of pedestrians." The judge should properly have found upon these questions; but upon the undisputed evidence he should have found against the defendant, and, therefore, he has suffered no harm from the neglect or refusal to find. The facts proved by uncontradicted evidence, and found, showed that the obstruction was unreasonable. If the trial judge had responded to these findings in favor of the defendant, and had yet rendered judgment against him, the judgment would still have been based upon sufficient facts and could not have been disturbed. The opinion and conclusion of the trial judge, notwithstanding the other facts found, that the obstruction caused by the defendant was not unreasonable, would not have been controlling and would not have sustained a judgment in favor of the defendant. Such a judgment would have been against the evidence.

But the judgment rendered is too broad and general in its terms. It is as follows: "That plaintiffs are entitled to an injunction perpetually restraining the defendant, his agents, servants or employees, from obstructing the southerly sidewalk of Vesey street, in front of the premises Nos. 35 and 37 Vesey street, by any plank-way or bridge or other like obstruction, elevated above the sidewalk, and reaching from said store, or from the stoop in front of said store to the roadway of said Vesey street, or from hindering or preventing the plaintiffs or their employees, servants and customers from having the free and unobstructed use of and passage along the sidewalk of said Vesey street in front of said premises, Nos. 35 and 37 Vesey street, by any like obstruction." The judgment entirely prevents the defendant from using the bridge or other like obstruction. We find nothing in the evidence which justifies this. We cannot perceive that the bridge is in any

material degree a greater obstruction than skids would be if similarly used. The judgment should be so modified as to read as follows: "It is ordered and adjudged that the defendant, his agents, servants and employees refrain from unnecessarily or unreasonably obstructing the southerly sidewalk of Vesey street in front of the premises Nos. 35 and 37 Vesey street, by any plank-way or bridge or other like obstruction elevated above the sidewalk and reaching from said premises or from the stoop in front of the same to the roadway of said Vesey street, or from unnecessarily or unreasonably hindering or preventing the plaintiffs or their employees, servants and customers from having the convenient use of and passage along the sidewalk of said Vesey street in front of said premises Nos. 35 and 37 Vesey street, by any like obstruction; and it is further adjudged that the plaintiffs recover of the defendant \$164.20 costs of this action;" and, as so modified, it should be affirmed, without costs to either party in this court.

It is difficult to frame the judgment by the use of general language so as to protect and secure the rights of the parties. But the rules we have laid down in this opinion will probably be found sufficient as a guide if it should be necessary to enforce the judgment as modified, and therefrom the meaning and scope of the important words "unnecessarily" and "unreasonably" may, with sufficient accuracy, be ascertained.

All concur.

*Judgment accordingly.*¹

¹ See *Rez v. Carlile*, 6 C. & P. 636; *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713, ante, p. 468; *Mathews v. Kelsey*, 58 Me. 56; *O'Linda v. Lothrop*, 21 Pick. 292; *Graves v. Shattuck*, 35 N. H. 257; *Lippincott v. Lasher*, 44 N. J. Eq. 120.

"It seems very clear that if, as was assumed in *Hundhausen v. Bond*, 36 Wis. 29, the abutting owner's right to temporarily use a part of the street for building operations arises from his ownership of the fee of one half of the street, then the extent of the right must be limited by the extent of the ownership, and the charge of the court in this case was right. If, on the other hand, the right is founded on reasonable necessity alone, the extent of ownership in the street can cut no figure, because the necessities of an abutting owner who has no ownership in the adjoining street are just as great, other things being equal, as the necessities of the abutter who owns the fee to the centre of the street. The principle that an abutting lot-owner in a city has a right to use temporarily a reasonable portion of the street has been long recognized in both English and American law, and is laid down in numerous adjudicated cases. Many of these cases are cited in appellants' brief. We have carefully examined these cases, and nowhere do we find that the right is based upon the ownership of the fee of any part of the street, but always upon the necessities of the situation. Nowhere is the reason of the rule more tersely and clearly stated than in the early case of *Comm. v. Passmore*, 1 Serg. & R. 217, where Tilghman, C. J., uses the following language: 'It is true that necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be *absolute*; it is enough if it be *reasonable*. No man has a right to throw wood or stones into the street at his pleasure; but, inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner.' Such is substantially the line of reasoning of all of the cases. The right is a temporary invasion of the public easement of passage. Ownership of

the fee cannot justify this invasion, because the fee is entirely and completely subordinate to the dominant easement; it can only be justified on the ground of necessity. This view is greatly strengthened by the case of *Van O'Linda v. Lothrop*, 21 Pick. 292, which is the only case relied upon in *Hundhausen v. Bond*, and which is there approved as accurately stating the law. In *Van O'Linda v. Lothrop*, the abutting owner, who was held to have the right to place building materials in the adjacent way, was expressly decided to have no ownership in the way at all, but to have a mere right of way, in common with others, over it, and his right was based solely on the ground of necessity. The fact that the *Hundhausen Case* was based upon the *Van O'Linda Case*, where the element of ownership of the fee was entirely lacking, would seem to be proof that the subject of the foundation of the right was not investigated nor intended to be decided in the *Hundhausen Case*." WINSLOW, J., in *Raymond v. Keesberg*, 84 Wis. 302, 309 (1898).

ADDITIONAL SERVITUDES. In the first edition of these Cases, there were printed six cases on what constitutes an "additional servitude" upon the soil under a highway, for the creation of which compensation is due to the owner of the soil or an abutter. In view of the much more elaborate treatment of this subject in Professor Thayer's Cases on Constitutional Law, it has seemed advisable to leave these questions to the work in the course on Constitutional Law, where it more properly belongs.

CHAPTER VI.

FRANCHISES.¹

2 BL. COX. 87. Franchise and liberty are used as synonymous terms; and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the Crown, they must arise from the king's grant; or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man or in many: but the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant.¹

HALE, DE JURE MARIS, c. 2. The king by an ancient right of prerogative hath had a certain interest in many fresh rivers, even where the sea doth not flow or reflow, as well as in salt or arms of the sea; and those are these which follow.

1st. A right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a publick regulation; viz. that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these, he is finable. And hence it is, that if a common bridge be broken, whereby there is no passage but by a boat or ferry, it hath been anciently practised in the Exchequer to compel that ferry man, that ferries over people for profit without a charter from the king or a lawful prescription, to account for the benefit above his reasonable pains and charge.

¹ See 1 Tiffany, Real Prop. 9; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (1837).

See on Forests, &c., Wms. Commons, Lect. xvi.

Magna Carta, c. 16 (1225), provides that "no banks shall be defended from henceforth but such as were in defence in the time of King Henry our grandfather, by the same places and the same bounds as they were wont to be in his time. See *Malcomson v. O'Dea*, 10 H. L. C. 593.

IPSWICH v. BROWNE.

EXCHEQUER CHAMBER. 1581.

[Reported Sav. 11.]

IN the Exchequer Chamber it was held for law that a ferry is in respect of the landing place, and not in respect of the water; that the water may belong to one, and the ferry to another, as it is the case with the ferries on the Thames, that the ferry in one place belongs to the Archbishop of Canterbury where the Mayor of London has the interest in the water. And if one has piscary in any water, he has no power to land without the assent of the owners of the freehold.

And in every ferry the land on both sides of the water must belong to the owner of the ferry, else he cannot land on the other side.¹

And a ferryman, if he be on a salt water, is to be privileged from being pressed as a soldier or otherwise. And this was said in a case between the *Inhabitants of Ipswich* and *Philemon Browne*.²

8 BL. COM. 219. If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects, otherwise he may be grievously amerced; it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burden.³

¹ "I think that what is laid down in Saville is not law to the extent to which it is there stated. The owner of the ferry must, as incident to the ferry, have such right to use the land on both sides as to enable him to embark and disembark his passengers; but he need not for that purpose have any property in the soil. It is sufficient if he has a right to use the land for all the purposes of his ferry. This is a right to use the land of another for a particular purpose, and is an incorporeal hereditament." *Per* HOLROD, J., in *Peter v. Kendal*, 6 B. & C. 703, 711 (1827).

² "The principle to be deduced from these authorities of the nature of the franchise, and the uses and purposes for which a ferry is licensed and established, is that a ferry can only exist in connection with some highway or place where the public have rights and the grant of a ferry franchise. The grant of a ferry franchise for the transportation of persons and property across a stream to and from a place where there is no highway, or in which the public have no rights, would be void and inoperative. The object of a ferry being to connect highways or places in which the public have rights when intersected by streams, it becomes, when licensed and established, a part of such highway or line of travel between such places." LORD, J., in *Hackett v. Wilson*, 12 Oreg. 25, 33 (1885).

³ See *Letton v. Goodden*, L. R. 2 Eq. 123.

HUZZEY v. FIELD.

EXCHEQUER. 1835.

[Reported 2 C. M. & R. 432.]

LORD ABINGER, C. B.¹ This was an action on the case for the disturbance of the plaintiff's ferry over Milford Haven, tried before my Brother Parke at Haverfordwest. It was claimed in the declaration in different ways; but the question reserved for the consideration of the court arises on the count which complains of a disturbance of Nayland Ferry.

The plaintiff was the lessee, under Sir John Owen, of a ferry, called the Pembroke or Burton Ferry, across Milford Haven, which was the ordinary communication between Pembroke and Haverfordwest. He was also lessee, under the same gentleman, of another ferry from the same point, on the Pembroke side, to Nayland and back; there was no question as to the right of the plaintiff to both these ferries. He claimed also a much more extensive right, that of ferrying all persons backwards and forwards over Milford Haven, within no very narrow limits; but this right was negatived by the jury on the trial.

It appeared, however, that the defendant had, before the commencement of this suit, set up a boat to carry passengers from Nayland to the opposite side, and, amongst other places, to Hobbes's Point, more than half a mile from the Pembroke Ferry-house. At this place a hard or pier had been built, to improve the communication between England and Ireland, and a road made from thence to Pembroke, which communicated with the turnpike road from Pembroke Ferry to Pembroke, at a distance of more than half a mile from the ferry; and the way from Nayland to Pembroke, by Hobbes's Point, was shorter than by Pembroke Ferry. There was no town or vill between Hobbes's Point or Pembroke Ferry, and the junction of the new with the old road; and, I rather believe, none between that point and Pembroke, although that circumstance was not inquired into on the trial.

On one occasion, a boy in the service of the defendant, and in his boat, received a passenger on board at Nayland, who, after the boat had been shoved off the shore, informed him he was going to Pembroke, and desired to be put on shore at Hobbes's Point; and this was done.

The jury having found for the defendant on the other questions in the cause, these points were reserved for the consideration of the court, — 1st, whether the defendant was responsible for this act of his servant; and, 2dly, whether, if he was, the facts proved amounted to a disturbance of the plaintiff's right of ferry, the jury having negatived any fraud in fact on the part of the defendant or his servant.

¹ The opinion only is given.

A rule *nisi* having been granted for a new trial, the case was argued before my Brothers PARKE, BOLLAND, GURNEY, and myself.

Upon the first point there is no difficulty. The servant was acting at the time in the course of his master's service, and for his master's benefit; and his act was that of the defendant, although no express command or privity of his master was proved. *Tuberville v. Stampe*, 1 Ld. Raym. 265.

The second point is one of a more doubtful nature, and has called for much consideration. It is quite clear, that a ferry is a franchise which none can set up without a license from the Crown; and in the case of a ferry by prescription, a grant or license is presumed. As early as in the Year-Book, 22 Hen. 6, 146, it is thus laid down by Paston: "If I have of ancient time a ferry in a town, and another sets up a ferry upon the same river near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case;" and Newton says: "The case of a ferry differs from that of a mill, for you are bound to sustain the ferry, to serve and repair it, in ease of the common people, and is inquirable before the sheriff in his tourn, and justices in Eyre." This proposition is quoted in 2 Roll. 140 G, pl. 4, Com. Dig. Piscarry, B., and Action on the Case for a Nuisance, and in most of the cases in which the rights of ferry have come in question.

In the case of *Churchman v. Tunstall*, Hardres, 162, in the Exchequer, in the time of the Commonwealth, 1659, the plaintiff, the farmer of a ferry at Brentford, as it would seem, under the Crown, filed a bill for an injunction to restrain the defendant, who had lands on both sides of the Thames, three quarters of a mile off, and who was in the habit of ferrying passengers across, from continuing to do so. The bill was dismissed without costs; but the reporter adds a query as to the propriety of the decision; and even if it was right, it is no authority against the maintenance of an action on the case. The decision, however, appears to have been wrong; for, upon another bill filed in 1663, after the Restoration, a decree was made by Lord Hale on the 18th of June, 14 Car. 2, in favor of the same plaintiff, that the new ferry should be put down.

In *Blissett v. Hart*, Willes, 508, the plaintiff recovered in an action on the case, against the defendant, for setting up another ferry over the same river, near the plaintiff's ferry, and ferrying over persons and horses over the same river, near the plaintiff's ferry, by which she was obliged to let it for less rent than before, and had been deprived of great part of the profit of it. On motion in arrest of judgment, the court held the declaration to be good, and they said, that "a ferry is a franchise that no one can erect without a license from the Crown; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a license, the Crown has a remedy by *quo warranto*, and the former grantee has a remedy by action. The franchise is the ground of the action." Willes, 512 n.

So far the authorities appear to be clear, that, if a new ferry be set

up without the king's license, to the prejudice of an old one, an action will lie; and there is no case which has the appearance of being to the contrary, except that of *Tripp v. Frank*, hereafter mentioned. These old authorities proceed upon the ground, first, that the grant of the franchise is good in law, being for a sufficient consideration to the subject, who, as he receives a benefit, may have, by the grant of the Crown, a corresponding obligation imposed upon him in return for the benefit received; and secondly, that, if another, without legal authority, interrupts the grantee in the exercise of his franchise, by withdrawing the profit of passengers, which he would otherwise have had, and which he has, in a manner, purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury; and the case is, in this respect, analogous to the grant of a fair or market, which is also a privilege of the nature of a monopoly.

A public ferry, then, is a public highway, of a special description, and its *termini* must be in places where the public have rights, as, towns or villa, or highways leading to towns or villa. The right of the grantee is, in the one case, an exclusive right of carrying from town to town, in the other, of carrying from one point to the other, all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers, must be injurious.

For instance, if any one should construct a new landing-place at a short distance from one *terminus* of the ferry, and make a practice of carrying passengers over from the other *terminus*, and there landing them at that place, from which they pass to the same public highway upon which the ferry is established, before it reaches any town or vill, and by which the passengers go immediately to the first, and all the villa and towns to which that highway leads; there could not be any doubt that such an act would be an infringement of the right of ferry, whether the person so acting intended to defraud the grantee of the ferry or not.

If such new ferry be nearer, or the boats used more commodious, or the fare less, it is obvious that all the custom must inevitably be withdrawn from the old ferry; and thus the grantee would be deprived of all benefit of the franchise, whilst he continued liable to all the burden imposed upon him.

It does not follow from this doctrine, that, if there be a river passing by several towns or places, the existence of a franchise of a ferry over it, from a certain point on one side to a point on the other, precludes the King's subjects from the use of the river, as a public highway from or to all the towns or places on its banks, and obliges them, upon all occasions, to their own inconvenience, to pass from one *terminus* of the ferry to the other. The case of *Tripp v. Frank*, 4 T. R. 666, decided otherwise; and it is not intended to question that decision. It was there held that the plaintiff, who had a right of ferry from Hull to the town of Barton, had no right of action against a person who carried

passengers from Hull to Barrow, a place on the banks of the river, at some distance from Barton. But, suppose he had known that the passengers were going by that route to Barton, and that their sole object was to go there; or suppose that Barton, instead of being within a few hundred yards from the Humber, was a mile distant, and was the first town with which either ferry communicated, it would not follow, from that decision, that in such a case passengers might be landed at Barrow, for the sole purpose of going to Barton.

We have thought it right, in consequence of the course taken by the counsel in argument, to enter thus far into the general question, and to lay down these principles, that it may not be supposed that the decision to which we find ourselves obliged to come, can in any manner affect the plaintiff's right to the exclusive privilege of ferrying passengers who leave Nayland with no other object than that of going to Pembroke.

But, fully admitting his right, we are of opinion, after much deliberation, and, I may add, not without some hesitation, that there is no sufficient ground for making the rule absolute.

It is to be observed, that, between Hobbes's Point and the junction of the two roads that lead from that place and from Pembroke Ferry respectively to the town of Pembroke, there are intermediate points, to which the passenger Llewelyn might be going; though Pembroke was his ultimate object, it might not be his only object; and, if he had any particular view of convenience in making Hobbes's Point the place of his landing, which could not have been accomplished as well by landing at Pembroke Ferry, then, according to the principles laid down in the case of *Tripp v. Frank*, there would have been no evasion of the plaintiff's ferry. It is true that the intentions of Llewelyn are left very uncertain upon the evidence; and it does not appear from the report, that the counsel on either side thought proper to elicit them by any inquiry. And if this had been the real question which the parties intended to try, the Court might have been disposed to direct a new trial. But one cannot fail to observe that the main questions of fact in difference were fully tried and disposed of by the jury, and that the point stated upon Llewelyn's evidence was laid hold of for no other purpose than that of recovering a verdict for the plaintiff at all events, after all the matters really in difference had been decided against him. The court, therefore, is bound to look with strictness to the evidence, and not to allow the plaintiff any advantage from an uncertainty that he ought to have removed. It was incumbent on him to offer satisfactory proof that Llewelyn had no other object than to evade his ferry, and that the defendants were aware, and must have understood, that he had no other object. Now, the communication made by Llewelyn to the defendant's servant, after the boat had commenced her passage, is not inconsistent with his having some legitimate object in going to Hobbes's Point, besides that of going to Pembroke. The uncertainty, therefore, in which this point has been left by the evidence, makes it impossible to

say that the facts proved amounted to a disturbance of the plaintiff's ferry; therefore the rule cannot be made absolute, to enter a verdict for the plaintiff. And we think that the plaintiff, in a case of this sort, is not entitled to a new trial, that he may amend his evidence upon an incidental point, upon which he left it too doubtful to be properly submitted to the jury. The rule, therefore, must be discharged.

Rule discharged.

John Evans, for the defendant.

Sir J. Campbell, Sir W. Owen, Chilton, and E. V. Williams, contra.

NEWTON v. CUBITT.

COMMON PLEAS. 1862.

[*Reported 12 C. B. (N. S.) 82.*]

WILLES, J., delivered the judgment of the court:¹—

In the first count of the declaration the plaintiffs complain that the defendants had carried passengers in the line of their ferry; in the second, that they had so done near that of the said ferry, for the purpose of evading it.

The defendants carried to Greenwich passengers from Cubitt's Pier, which is on the eastern side of the Isle of Dogs, distant 1280 yards from Potter's Ferry Stairs, on the south side of that isle. The area of the isle is about one square mile. It is bounded by the Thames on three sides out of four. It was an uninhabited marsh down to 1800, with one roadway from Poplar on the north, to Potter's Ferry Stairs on the south; and at that time the passengers going along that road comprised all the passengers from the Isle of Dogs. Since 1800 it has become and now is populous, and covered with manufacturing and commercial establishments. Cubitt's Pier was made for the accommodation of Cubitt Town, built on the bank of the Thames at some distance from the roadway before mentioned, and only connected therewith by ways which the owner of the land has chosen to dedicate to the public.

Upon these facts, the questions are, — first, did the defendants carry within the line of the plaintiffs' ferry; and, if not, secondly, did they carry near to it, for the purpose of evading it?

In order to answer the first question, the extent of the plaintiffs' ferry must be ascertained. The plaintiffs claim the exclusive right of carrying all who pass from any part of the isle to Greenwich. In support of their claim they rely on a deed of 1676, and on usage. A part of the description of the ferry in the deed of 1676, taken by itself, tends to support this claim: "All that ferry extending itself from a place or marsh called the Isle of Dogs, over the Thames, into the town of

¹ The opinion only is given.

Greenwich." But, although these words may mean that every person passing from the Isle of Dogs to Greenwich must go by this ferry, there are other parts of the description which refer to usage; so that the extent must be ascertained thereby. It is a ferry commonly called and known as "Potter's Ferry." Usage must prove the application of this description. The concluding words also, viz., "in as ample a manner as the same hath heretofore been used, occupied, or enjoyed," make the limits depend on usage. Furthermore, the nature of the franchise seems to be repugnant to the plaintiffs' claim of a ferry from every part of the isle indiscriminately.

A ferry exists in respect of persons using a right of way, where the line of way is across water. There must be a line of way on land, coming to a landing-place on the water's edge (as in this case, to Potter's Ferry Stairs), or, where the ferry is from or to a vill, from or to one or more landing-places in the vill. The franchise is established to secure convenient passage; and the exclusive right is given because in an unpopulous place there might not be profit sufficient to maintain the boat, if there was no monopoly. The ferry is unconnected with the occupation of land, and exists only in respect of persons using the right of way. The questions, whence they come, and whither they go, are irrelevant to the exercise of that right; and the ferryman has no inchoate right in respect of any of them, unless they come to his passage.

Such being the nature of a ferry, the notion that a large area of land should be subjected to the servitude that the owners and occupiers thereof should be prohibited from using the highway of the Thames as they may choose, and should be under an obligation to get to the highway leading from Potter's Ferry Stairs, and cross to Greenwich only therefrom, is anomalous; and, if Cubitt Town had been built without a way therefrom to the road to Potter's Ferry, the performance of the supposed obligation would necessitate a trespass.

The cases on the nature of a ferry are few; and we cite only *Paine v. Partrich*, Carth. 191. There, the court decided that case did not lie for an obstruction of a highway, without special damage; that a passage over the water is of the same nature as a highway for all people; and that the plaintiff, who claimed as an inhabitant of Littleport, had not the passage as such inhabitant, but as a subject.

If the line of the plaintiffs' ferry be taken to be from Potter's Ferry Stairs only, and not from the whole isle, the defendants have not carried in that line, and the first count fails.

The second count, charging that the defendants carried near the line of ferry, for the purpose of evading it, raises another question. The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way; and, if the alleged wrongdoer makes a landing-place near to the ferry landing-place, so as to be in substance the same, making no material difference to travellers,

such a wrongdoer would be guilty of the wrong complained of in the second count: he would indirectly carry in the line of the plaintiffs' ferry.

Then, have the defendants done this wrong? We think not. Cubitt Town is at such a distance from Potter's Ferry as is substantially important for those who have to pass therefrom to Greenwich; and it is found that the defendants had not the purpose of evading the plaintiffs' ferry, or of diverting traffic therefrom.

The principle by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable, has not been clearly laid down. It seems reasonable to infer, that, if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway; and it is obvious that the single landing-place which sufficed for an uninhabited marsh, would be utterly inadequate for several towns thronged with industrial mechanics. If one hundred of such laborers pass now to Greenwich where one traveller passed in 1800, it seems oppressive to fix on such a large number of laborers the perpetually repeated loss of three quarters of a mile of walking, for the sake of the small fraction of the toll which is the profit on each passenger, and unreasonable so to increase that profit. If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable.

The authorities do not define, either in respect of ferries or markets, or the like, what proximity is actionable. *Fleta*, lib. 4, c. 28, § 13, describes the proximity of a new market which is actionable to be seven miles, on the calculation of twenty miles a day for each person's travelling; and he therefore allows seven miles out and seven back, and time for marketing besides. Such a limit, on such a reason, might be suited to the simple wants of a rude life, where inhabitants are few, but is unfitted for large towns, where daily wants are greatly multiplied. Under the latter circumstances, it seems that the area within which a new market would become actionable would be diminished from a diameter of fourteen miles by the public need; and, on the same reasoning, the area for the monopoly of a ferry would depend on the need of the public for passage.

We now proceed to the cases. The *dictum* of Paston, in 11 H. 6, fo. 14, only affirms that case will lie for infringing the right of a ferryman, and does not touch the question of proximity. In *Churchman v. Tunstal*, Hardres, 162, the complaint, by English bill, was, that the defendant carried over the Thames, in Brentford, three quarters of a mile below the plaintiffs' ferry for horses and passengers, and an injunction was prayed to stop it; the defendant contended that the restraint which the plaintiff would lay on others was uncertain, and at too great a distance; and the court decided for him, because it came too

near to a monopoly, and restrained trade. The decision by Lord Hale between the same parties is said, in *Huxzey v. Field*, 2 C. M. & R. 482, to have been different; but neither the point of law, nor the facts on which Lord Hale acted, are stated. In *Tripp v. Frank*, 4 T. R. 666, the plaintiff's ferry was from Hull to Barton. The defendant carried from Hull to Barrow, two miles below Barton, on the Humber. The judgment is for the defendant. Lord Kenyon says: "If a person wishing to go from Hull to Barton had applied to the defendant, and he had carried them a little above or below the ferry, it would be a fraud on the plaintiff's right, and a cause of action. But here these persons were substantially and not colorably carried to a different place." And Ashhurst, J., adds, in effect, that it is unreasonable to require that a person crossing the Humber must be carried out of his way, on account of the plaintiff's ferry.

In *Huxzey v. Field*, 2 C. M. & R. 482, the plaintiff had a ferry from Nayland to Pembroke Point. The main highway from Haverford to Pembroke passed by Nayland, and thence over the water to Pembroke Point, and so to Pembroke. Afterwards traffic to Milford Haven increased, and Pajer Dock was built, and a landing-place at Hobbes's Point, half a mile from Pembroke Point, was made,—it being required for the accommodation of traffic in lines other than that from Haverford to Pembroke. The defendant took a passenger in his boat from Nayland Point, who, when afloat, ordered him to Hobbes's Point, saying he was going to Pembroke. The question was, whether these facts proved a disturbance of the ferry; and it was answered in the negative. The court describes a disturbance to be either by carrying from point to point, or by constructing a landing-place at a short distance from one terminus of the ferry, and carrying passengers thereto who were in reality passing along the line of way on which the ferry is situate. But, as it appeared in the case there were other places than Pembroke to which the passenger might be going from Hobbes's Point, without or before going to Pembroke, and if there was a convenience to him in landing at Hobbes's Point, which he could not have had by landing at Pembroke Point, he would not evade the plaintiff's ferry by landing at Hobbes's Point.

In the last two cases, the ferry was backwards and forwards, and the question arose in respect of the terminus *ad quem*. The law would have been precisely the same, as far as the consideration of convenient accommodation operates, if the question arose respecting the terminus *a quo*, as it necessarily does in this case, where the ferry is only one way. But these general principles, and their specific application to Potter's Ferry, were considered in *Matthews*, app., *Peache*, resp., 5 Ellis & B. 546, and the judgment was decisively in point for the defendants. The information was for plying as waterman, without a license. The defence was, that the defendant was exempt as a ferryman ferrying in Potter's Ferry from Cubitt's Dock, which is 800 yards from Potter's Ferry Stairs, to Greenwich. The court decided that

the ferry is from the stairs, and not from the Isle of Dogs to Greenwich, the indefinite words of the conveyance being defined by the exercise of the right; and that therefore the exemption for ferries did not extend to Cubitt's Dock, distant 800 yards. *A fortiori* it does not extend to Cubitt's Pier, which is 1280 yards distant from the ferry.

Therefore, upon principle and authority, it appears that the plaintiffs have neither the privileges nor the burdens of a ferry from Cubitt's Pier, and that all the Queen's subjects being at Cubitt's Pier, whether from Poplar or elsewhere, have a right to use the highway of the Thames therefrom either to Greenwich or elsewhere at their free will and pleasure, either by wherries or steamer.

It follows that no right of the plaintiffs is shown to have been infringed by the defendants, and that the defendants are entitled to our judgment.

*Judgment for the defendants.*¹

Pigott, Serjt. (with whom was *Powell*), for the plaintiffs.

Lush, Q. C. (with whom were *Raymond* and *Humphrey*), contra.²

LIPPENCOTT v. ALLANDER.

SUPREME COURT OF IOWA. 1869.

[Reported 27 Iowa, 400.]

A LICENSE was issued to A. J. Kerr, by the supervisors of Van Buren county, authorizing him to keep a ferry across the Des Moines river, between Bentonsport and Vernon. The plaintiff and others

¹ *Gates v. McDaniel*, 2 Stew. 211 (1829).

Accordingly in *Smith v. Harkins*, 3 Ired. Eq. 613 (1845), it was held that a free bridge was a disturbance to a ferry. So a free ferry is a disturbance to another ferry. *Long v. Beard*, 3 Murphy (N. C.), 57 (1819); *Aikin v. Western R. R. Co.*, 20 N. Y. 370 (1859); *Harrell v. Ellsworth*, 15 Ala. 576 (1850). So a free ferry is a disturbance to a bridge. *Norris v. Farmers' Co.*, 6 Cal. 590 (1856).

But cf. *Hopkins v. Gt. North. R. Co.*, 2 Q. B. Div. 224.

As to the power of the legislature to grant franchises in these cases, see *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (1837).

"The legislature having jurisdiction of the whole subject may limit a ferry franchise according to its pleasure. It may confer the right to operate a ferry across a river between two places in both directions, or it may limit the right so that the ferry can be operated from one side of the river only. A legislative grant of a ferry franchise across a river from a place on one side to a place on the other side, standing alone, unexplained, would ordinarily be construed to give the right of a ferry across the river between the two places in both directions. Common sense and public convenience would require such a construction. But to determine whether a legislative grant authorizes a ferry in both directions or only in one, all the language of the grant must be scrutinized, and all legislative acts *in pari materia* and the user under them and the circumstances of the particular case must be considered." *Earl J.*, in *Power v. Village of Athens*, 99 N. Y. 592, 598 (1885).

² Affirmed in Ex. Ch., 13 C. B. (N. S.) 864.

made application to the board of supervisors to vacate the license, because of various acts of those operating the ferry alleged to be in violation of their duty as ferrymen, and because of the death of Kerr, to whom the license was issued. The District Court held that the death of Kerr vacated the license; the General Term affirmed this decision. Defendants' appeal.

The same parties have been twice heretofore in this court in cases growing out of this same ferry. See 23 Iowa, 536, and 25 id. 445.

Francis Semple for the appellants.

J. C. Knapp and *Bertrand Jones* for the appellee.

BECK, J. But one question is presented by the record for our determination; it is this: Is a ferry license vacated or the franchise lost by the death of the party to whom it was granted? The right acquired under a ferry license is called a franchise, and is conferred by grant from the government, and with an implied covenant, on the part of the government,¹ not to invade the right vested, and, on the part of the grantee, to perform the duties and conditions prescribed by the grant. 3 Kent's Com. 458. This franchise is included in the general denomination of incorporeal hereditaments, a term used to distinguish one of the different kinds of things real. It partakes of a double nature and character. So far as it affects or concerns the public it is *publici juris*, and is subject to governmental control. The legislature may prescribe the manner of granting it, to whom it may be granted, the conditions and terms upon which it may be held, and the duty of the grantee to the public in exercising it, and also provide for its forfeiture upon the failure of the grantee to perform that duty. But when granted it becomes the property of the grantee and is a private right subject only to the governmental control growing out of its other nature of *publici juris*. *Benson v. Mayor of New York*, 10 Barb. (S. C.) 223. In this character and nature it is essentially in all respects property, and is governed by the same rules as to its enjoyment and protection, and regarded by the law, precisely, as other property. *Conway v. Taylor's Ex'r*, 1 Black. 632; *Bowman's Devisee v. Wathan*, 2 McLean, 376; *Dundy v. Chambers*, 23 Ill. 370; 3 Kent's Com. 458.

The fact that it is conferred by grant from the government, and

¹ Defendants were the executors of A. J. Kerr, deceased. See 23 Iowa, 536. — ED.

² "I agree that the commencement of a ferry must be by royal grant or license from the Crown, and that the grant must be shown or such evidence of ancient user must be adduced, as will satisfy the jury that it originally had that commencement. But I can see no difference between this and other ordinary cases of prescription." L. C. B. ALEXANDER, in *Trotter v. Harris*, 2 Y. & J. 285, 288 (1826). "The existence of the ferry for thirty-five years having been proved, and the plaintiff's possession being established, the allegation in the declaration was satisfied, and his cause of action was complete upon evidence of the interruption. An user for so long a period was evidence from which the jury might presume that the ferry had a legal origin." VAUGHAN, B., ib. 289. *Semle*, contra, *Sullivan v. Board of Supervisors*, 63 Miss. 700, 801 (1881).

may be forfeited by mis-user or non-user, does not argue that it is not property, or that it may be lost in a way or manner which will not deprive the owner of other property of his rights therein.

Under the provisions of our statute, ferry licenses are granted by the board of supervisors of the county for a limited time, and to such persons as, in the opinion of the board, will best serve the public interest, preference being given to the owner of the land or of a previous ferry. Conditions and terms may be imposed by the board as prescribed by the statute, and for the violation thereof the license may be revoked. No restriction is imposed upon the sale or transfer of the franchise, and there is no provision that, upon the death of the party to whom the license was issued, it shall be vacated and the franchise lost.

It may be sold upon execution as real property, except that the purchaser may take immediate possession of all property ordinarily used in the exercise of the franchise, which, it is provided, is transferred by the sale. The purchaser at once enters upon the exercise of the franchise. It is exposed to sale differently from other property; he who will take the franchise for the shortest time, within the period for which the license was issued, in satisfaction of the execution, shall be considered the highest bidder. Rev. chap. 54. Nothing is found in this chapter or in other statutes taking from this franchise the character of property possessed by all other things over which men exercise dominion and ownership. The peculiar provision regulating the manner of its sale upon execution is designed to secure the continuance of the ferry for the public convenience, notwithstanding the transfer of the franchise thereby. No argument can be drawn from this provision in support of the decision of the court below.

It is argued that the grant of the franchise is made in view of the fitness and qualifications of the grantee and involves a personal trust which cannot be assumed and exercised in case of his death by his representatives, because they may be unfit and unqualified therefor. Hence it is thought the death of the grantee terminates the franchise. The answer to this is that, if the person exercising the franchise fails to perform the duties appertaining thereto, the license, by proper proceedings, may be revoked. Rev. § 1212. And that this position of appellee is not in accordance with the policy of our statutes is made very plain, by the provisions permitting and regulating the sales of the franchise upon execution. In such case the purchaser, by substitution, assumes the duties of the original grantee, and acquires all his rights. No reason can be given why the law will permit this, and yet prohibit the exercise of the franchise, in case of the death of the grantee, by his representatives. The doctrine contended for leads to another inconsistency, namely: the franchise may be subjected to the payment of the debts of the grantee in his life-time, but is not assets for the payment of the same debts after his death.

The grant of a ferry franchise is made for a specified time, not less than three nor more than ten years, with no reservation that it shall terminate upon the death of the grantee. Being, as we have seen, property it would not, upon every analogy of the law, be lost by the death of the grantee. At common law it was granted as other real property in estates for years, for life or in perpetuity, and was so held. Under our statute it is granted in an estate for years only, and the death of the grantee can no more terminate it than the death of a tenant can terminate a like estate in lands.

The above hardship and injustice of the rule contended for support a powerful argument against it. These franchises often require great outlays for boats, improvement of roads, etc., in order to render them remunerative to the owners and useful to the public. The property thus acquired is valuable only in connection with the franchises, and if they are forfeited by the death of the grantees, great loss and gross injustice would thus be wrought their estates.

The doctrine contended for by defendant's counsel is not supported by the authorities they cite, viz., *Munroe v. Thomas*, 5 Cal. 470, and *Thomas v. Armstrong*, 7 id. 286. These cases hold that ferry franchises are not the subjects of levy and sale under execution. The decisions appear to be based upon the grounds that a ferry franchise "involves a personal trust granted by the sovereign, upon conditions imposed upon the grantee alone, and his liability cannot be removed by substitution." Such sales, as we have seen, are recognized by our statutes, and the ground of these decisions seems to be unsupported by reason and principles of law. The other authority cited (*Bowman v. Wathin*, 1 Howard, 189) does not appear applicable to the question involved in this case.

*Reversed.*¹

¹ See *State v. Willis*, Busbee, 223. Cf. *Rohn v. Harris*, 130 Ill. 525, 530.

CHAPTER VII.

RENTS.

SECTION I.

NATURE, KINDS, AND REMEDIES.

Lrr. § 213. Three manner of rents there be, that is to say, rent service, rent charge, and rent seck. Rent service is where the tenant holdeth his land of his lord by fealty and certain rent, or by homage, fealty and certain rent, or by other services and certain rent. And if rent service at any day, that it ought to be paid, be behind, the lord may distrain for that of common right.¹

¹ "Before the passing of the Statute of *Quia Emptores*, 18 Ed. 1, St. 1, which prohibited the subinfeudation of land, rents might be and were reserved upon a feoffment in fee simple. Such rent was rent service incident to the seignior, and was distrainable for of common right. Lit. 216. Many rents so created are still in existence, and are variously termed *chief rents*, *rents of assize*, *quit rents*, and *fee farm rents*. *Chief rents*, in the original, as distinguished from the modern sense of the word, are such rents as are payable by the freeholders of a manor to the lord under whom they hold. 1 Steph. Com. 675. *Rents of assize* are similar rents payable by a freeholder or copyholder of a manor, the name being derived from the original reservation having been assized, i. e., reduced to a certainty by the lord of the manor. Scriven on Copyholds, 6th ed., 208. The term *quit rent* is often applied to both chief rents and rents of assize, but, strictly speaking, is applicable only to a rent reserved in lieu of all services, because then the tenant is quit from other services. Scriven on Copyholds, 6th ed., 208. All these are rents service, and must have been paid immemorially (Scriven on Copyholds, 6th ed., 208), or at least since before the passing of the Statute *Quia Emptores*.

"*Fee farm rents*, though very similar, differ somewhat from those last mentioned. They were rents reserved upon feoffments of land in fee rendering yearly the true value, or more or less, for which tenements neither homage, wardship, marriage, nor relief could be demanded without special stipulation. Britton, book iii. ch. ii. Feoffments of this kind appear thus to have been more analogous to a lease at rack rent than to an ordinary feudal grant, in which the services were regarded as of more importance than the rent. With the growth of the commercial and decay of the feudal spirit, this form was no doubt increasingly adopted. We read in Hallam's Middle Ages, ch. viii. part iii., that one of the earliest and most important changes in the condition of the burgesses of towns was the conversion of their individual tributes into a perpetual rent from the whole borough. The town was then said to be affirmed or let in fee farm to the burgesses and their successors forever.

"A fee farm rent is often stated as a rent in fee issuing out of an estate in fee of at least one fourth of the value of the land at the time of its reservation. 2 Blackstone, 43; note to *Bradbury v. Wright*, 1 Dong. 626: Spelm. Gloss. 221, col. 1. The name, however, is founded on the perpetuity of the rent, not on the *quantum*. Harg., note to Co. Lit. 143 b; Maul. Firm. Burg. 3. Mr. Hargrave states that the sometimes confusing the term of fee farm to rents of a certain value probably arose partly from

Co. Lrr. 142 a. And the rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, comin, wheat, or other profit that lieth in render, office, attendance, and such like, as in payment of money. But a man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that should be repugnant to the grant: *non debet enim esse reservatio de proficuis ipsis, quia ea conceduntur, sed de redditu novo extra proficua*.¹

Lrr. § 214. And if a man will give lands or tenements to another in the tail, yielding to him certain rent by the year, he of common right may distrain for the rent behind, though that such gift was made without deed, because that such rent is rent service. In the same manner it is, if a lease be made to a man for life, or the life of another, rendering to the lessor certain rent, or for term of years rendering rent.

Lrr. § 215. But in such case, where a man upon such a gift or lease will reserve to him a rent service, it behooveth, that the reversion of the lands and tenements be in the donor or lessor. For if a man will make a feoffment in fee, or will give lands in tail, the remainder over in fee simple, without deed, reserving to him a certain rent, this reservation is void, for that no reversion remains in the donor, and such tenant holds his land immediately of the lord, of whom his donor held, &c.

Lrr. § 216. And this is by force of the Statute of *Quia Emptores terrarum*. For before that Statute, if a man had made a feoffment in fee simple, by deed or without deed, yielding to him and to his heirs a certain rent, this was a rent service, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service, as the feoffor did hold over of his lord next paramount.

Lrr. § 217. But if a man, by deed indented, at this day maketh such

the Statute of Gloucester, which gave the *cessavit* only where the rent amounted to one fourth of the value of the land, and partly from its being most usual on grants in fee farm not to reserve less than a third or fourth of such value. It is stated in Britton, book iii. ch. ii., that if the feoffees ceased to pay the rent for two years together, an action thereby accrued to the feoffors or their heirs to demand the tenements in demesne.

"It would appear to be the better opinion that fee farm rents, properly so called, are rents service, and cannot therefore be created since the passing of the Statute *Quia Emptores*. Harg., note to Co. Lit. 143 b. The term, however, has been freely used, and in very modern Acts of Parliament; e. g., Conveyancing Act, 1881, § 14 (3); Settled Land Act, 1882, §§ 10, 20, with reference to the rent charges which are continually being created as the consideration for conveyances of freehold land." — Harrison, Chief Rents, 2-5.

As to which of the United States have preserved the law of distress, see 2 Tayl. Landl. & Ten. (8th ed.) §§ 558, 559.

¹ "A reservation of a part of the thing demised cannot properly operate as a render, and it may be admitted that it operates as an exception." — Per LORD ELLENBOROUGH, C. J., in *The King v. Pomfret*, 5 M. & S. 139, 143 (1816). Cf. *The King v. St. Austell*, 5 B. & Ald. 693. See also *Doe d. Edney v. Benham*, 7 Q. B. 976.

a gift in fee tail, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heirs a certain rent, and that if the rent be behind, it shall be lawful for him and his heirs to distrain, &c., such a rent is a rent charge; because such lands or tenements are charged with such distress by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heirs a certain rent, without any such clause put in the deed, that he may distrain, then such rent is rent seck; for that he cannot come to have the rent, if it be denied, by way of distress; and if in this case he were never seised of the rent, he is without remedy, as shall be said hereafter.

Co. LIT. 144 a. Note that upon a reservation of a rent upon a feoffment in fee by deed indented, the feoffor shall not have a writ of annuity, because the words of reservation, as *reddendo, solvendo, faci-endo, tenendo, reservando*, &c., are the words of the feoffor, and not of the feoffee, albeit the feoffee by acceptance of the estate is bound thereby.

LIT. § 218. Also, if a man seised of certain land grant, by a deed poll, or by indenture, a yearly rent to be issuing out of the same land, to another in fee, or in fee tail, or for term of life, &c., with a clause of distress, &c., then this is a rent charge; and if the grant be without clause of distress, then it is a rent seck. And note that rent seck *idem est quod redditus siccus*; for that no distress is incident unto it.

LIT. § 219. Also, if a man grant by his deed a rent charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind, and the distress detain until he be paid. But he cannot do, or have, both together, &c. For if he recovers by a writ of annuity, then the land is discharged of the distress, &c. And if he doth not sue a writ of annuity, but distrain for the arrearages, and the tenant sueth his replevin, and then the grantee avow the taking of the distress in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity.

LIT. § 220. Also, if a man would that another should have a rent charge issuing out of his land, but would not that his person be charged in any manner by a writ of annuity, then he may have such a clause in the end of his deed. *Provided always that this present writing, nor anything therein specified, shall any way extend to charge my person by a writ or an action of annuity, but only to charge my lands and tenements with the yearly rent aforesaid, &c.* Then the land is charged, and the person of the grantor discharged.

LIT. § 225. Also, if there be lord and tenant, and the tenant holds of his lord by fealty and certain rent, and the lord grant the rent by his deed to another, &c., reserving the fealty to himself, and the tenant attorns to the grantee of the rent, now this rent is rent seck to the

grantee; because the tenements are not holden of the grantor of the rent, but are holden of the lord who reserved to him the fealty.

LIT. § 226. In the same manner, where a man holds his land by homage, fealty and certain rent, if the lord grant the rent, saving to him the homage, such rent after such grant is rent seck. But there where lands are holden by homage, fealty and certain rent, if the lord will grant by his deed the homage, of his tenant to another, saving to him the remnant of his services, and the tenant attorn to him according to the form of the grant; in this case the tenant shall hold his land of the grantee, and the lord who granted the homage shall have but the rent as a rent seck, and shall never distrain for the rent, because that homage nor fealty nor escuage cannot be said seck, for no such service may be said seck. For he, which hath or ought to have homage, fealty or escuage of his land, may by common right distrain for it, if it be behind; for homage, fealty and escuage are services, by which lands or tenements are holden, &c., and are such services as in no manner can be taken but as services, &c.

LIT. § 227. But otherwise it is of a rent, which was once rent service; because when it is severed by the grant of the lord from the other services, it cannot be said rent service, for that it hath not fealty unto it, which is incident to every manner of rent service; and therefore it is called rent seck. And the lord cannot grant such a rent with a distress, as it is said.

LIT. § 228. Also, if a man let to another lands for term of life, reserving to him certain rent, if he grant the rent to another by his deed, saving to him the reversion of the land so letten, &c., such rent is but a rent seck; because that the grantee had nothing in the reversion of the land, &c. But if he grant the reversion of the land to another for term of life, and the tenant attorn, &c., then hath the grantee the rent as a rent service; for that he hath the reversion for term of life.

LIT. § 233. Also, if a man which hath a rent seck, be once seised of any parcel of the rent, and after the tenant will not pay the rent behind, this is his remedy. He ought to go by himself or by others to the lands or tenements out of which the rent is issuing, and there demand the arrearages of the rent; and if the tenant deny to pay it, this denial is a disseisin of the rent. Also, if the tenant be not then ready to pay it, this is a denial, which is a disseisin of the rent. Also, if the tenant, nor any other man, be remaining upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a denial in law, and a disseisin in deed, and of such disseisins he may have an assize of novel disseisin against the tenant, and shall recover the seisin of the rent, and his arrearages and his damages, and the costs of his writ and of his plea, &c. And if after such recovery [and execution had] the rent be again denied unto him, then he shall have a redisseisin, and shall recover his double damages, &c.

LIT. § 235. Also, if there be lord and tenant, and the lord granteth the rent of his tenant by deed to another, saving to him the other ser-

vices, and the tenant attorneth, that is a rent seck, as it is aforesaid. But if the rent be denied him at the next day of payment, he hath no remedy; because that he had not thereof any possession. But if the tenant when he attorneth to the grantee, or afterwards, will give a penny or a half-penny to the grantee in name of seisin of rent, then if after at the next day of payment the rent be denied him, he shall have an assise of novel disseisin. And so it is if a man grant by his deed a yearly rent issuing out of his land to another, &c. if the grantor then or after pay to the grantee a penny, or an half-penny, in the name of seisin of the rent, then, if after the next day of payment the rent be denied, the grantee may have an assise, or else not, &c.

Lrr. § 236. Also, of rent seck a man may have an assise of *morta-d'auueester*, or a writ of *ayel* or cosinage, and all other manner of actions real, as the case lieth, as he may have of any other rent.

Lrr. § 237. Also, there be three causes of disseisin of rent service, that is to say, rescous, replevin, and enclosure. Rescous is, when the lord distraineth in the land holden of him for his rent behind, if the distress be rescued from him, or if the lord come upon the land, and will distrain, and the tenant or another man will not suffer him, &c. Replevin is, when the lord hath distrained, and replevin is made of the distress by writ or by plaint. Enclosure is, if the lands and tenements be so enclosed, that the lord may not come within the lands and tenements for to distrain. And the cause, why such things so done be disseisins made to the lord, is for this, that by such things the lord is disturbed of the mean by which he ought to have come to his rent, *scil.*, of the distress.

Lrr. § 238. And there be four causes of disseisin of a rent charge: *scil.*, rescous, replevin, enclosure, and denial; for denial is a disseisin of a rent charge, as is said before of a rent seck.

Lrr. § 239. And there be two causes of disseisin of a rent seck; that is to say, denial and enclosure.

Lrr. § 240. And it seemeth, that there is another cause of disseisin of all the three services aforesaid; that is, if the lord is going to the land holden of him for to distrain for the rent behind, and the tenant hearing this encountereth with him, and forestalleth him the way with force and arms, or menaceth him in such form that he dare not come to the land to distrain for his rent behind for doubt of death, or bodily hurt, this is a disseisin, for that the lord is disturbed of the mean whereby he ought to come to his rent. And so it is, if, by such forestalling or menacing, he that hath rent charge or rent seck is forestalled, or dare not come to the land to ask the rent behind, &c.

Lrr. § 346. And here note two things: one is, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and in no manner it may be reserved to any strange person. But if two joint tenants make a lease by deed indented, reserving to one of them a certain yearly rent, this is good enough to him to whom the

rent is reserved, for that he is privy to the lease, and not a stranger to the lease, &c.

LIT. § 565. Also, if the lord of a rent service grant the services to another, and the tenant attorn by a penny, and after the grantee distrain for the rent behind, and the tenant make rescous; in this case the grantee shall not have an assize for the rent, but a writ of rescous, because the giving of the penny by the tenant was not but by way of attornment, &c. But if the tenant had given to the grantee the said penny as parcel of the rent, or a half-penny or a farthing by way of seisin of the rent, then this is a good attornment, and also it is a good seisin to the grantee of the rent; and then upon such rescous the grantee shall have an assize, &c.

CASE OF LORINGE'S EXECUTORS.

1852.

[*Reported Year Book 26 Edw. III. 10, pl. 5.*]

THE executors of W. L. brought a writ of debt against one T., and demanded one hundred marks of silver. And they declared that one S., late Earl of Kent, was seised of the moiety of the manor of L., and granted an annual rent of one hundred marks, to be taken from the said manor, to W., a testator, for the term of his life; and that the said W. was seised of the said rent by the hand of the Earl; and afterwards the said moiety of the manor came into the possession of the said T., in whose time, and in the life of their testator, the said annuity was detained, and was in arrear &c. to the amount of the sum which is in demand, wherefore they often, as executors, have come to the said T., tenant of the moiety of the manor charged, and prayed him that he would pay them. And they showed the will and the deed of grant of the annuity.

Birt. In the will their testator is named W. Loringe, Knight, and in the writ they name themselves executors of W. L., without Knight, so there is a variance from the will. Judgment of the writ.

And because the writ agreed with the deed of annuity in this point, and they did not deny that it was all the same person, the writ was adjudged good by WILBY [J. ?].

Birt. To this writ brought against T. as against the tenant of the land charged, we say that we have nothing, and never had, save in the right of our wife, A. by name; who is not named in the writ. Judgment of the writ.

Thorpe. Sir, we do not acknowledge what you say, but you see well how this is our writ of debt, and how after the death of our testator that which was an annual rent in his life is turned into the nature of debt, which debt he detains, and inasmuch as he does not deny that he is tenant of the land charged, in which case we understand that

although A. was dead, we should recover against her executors ; wherefore our writ is good against him ; for if I let lands for a term of years to a man and his wife, rendering me a certain rent, yet after the term I shall have a writ of debt against the husband alone. Wherefore &c.

And afterwards it was said by the court that the writ was good.

Birt. Where he has declared that the annuity was in arrear for fourteen years in our time, we say that we have never had anything in this land, save by reason of coverture, as in the right of A. our wife, who as long as she was sole, held for four years of the said fourteen years, so that we have never held the said land but for ten years, and that in the right of our wife not named in the writ. Judgment of the writ.

Thorpe. As to the four years, your plea is to the action, that you ought not to be charged with this debt. Wherefore consider what you shall answer to the remainder.

Momb. Your writ is brought against us alone, and you have demanded an entire rent, and part of the years with which you have charged us, our wife was sole seised of the tenements, wherefore you ought not to charge us ; so for that time our wife should be named in the writ, and this writ of debt cannot abate in part, if it does not abate in whole. Wherefore &c. And afterwards the parties took a day over by prayer of parties, and the writ was affirmed by prayer of parties &c.

ST. 32 HEN. VIII. c. 37. — Forasmuch as by the order of the common law, the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of lives, of rents services, rent charges, rents secks, and fee-farms, have no remedy to recover such arrearages of the said rents or fee-farms as were due unto their testators in their lives, (2) nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain or have any lawful action to levy any such arrearages of rents or fee-farms, due unto him in his life as is aforesaid ; (3) by reason whereof, the tenants of the demean of such lands, tenements or hereditaments, out of the which such rents were due and payable, who of right ought to pay their rents and farms at such days and terms as they were due, do many times keep, hold and retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee-farms were due, cannot have or come by the said arrearages of the same, towards the payment of the debts and performance of the will of the said testators : (4) For remedy whereof, be it enacted by the authority of this present Parliament, That the executors and administrators of every such person or persons, unto whom any such rent or fee-farm is or shall be due, and not paid at the time of his death, shall and may have an action of debt for all such arrearages, against the tenant or tenants that ought to have paid the said rent or fee-farms so being behind in the life of their testator, or against the executors and administrators of the said tenants ; (5) and also furthermore, it shall be lawful to every such executor and administrator of any such

person or persons unto whom such rent or fee-farm is or shall be due, and not paid at the time of his death as is aforesaid, to distrain for the arrearages of all such rents and fee-farms, upon the lands, tenements and other hereditaments, which were charged with the payment of such rents or fee-farms, and chargeable to the distress of the said testator, (6) so long as the said lands, tenements or hereditaments continue, remain and be in the seisin or possession of the said tenant in demesn, who ought immediately to have paid the said rent or fee-farm so being behind, to the said testator in his life, (7) or in the seisin or possession of any other person or persons claiming the said lands, tenements and hereditaments, only by and from the same tenant by purchase, gift or descent, (8) in like manner and form as their said testator might or ought to have done in his life-time, and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid.

III. And further be it enacted by the authority aforesaid, That if any man which now hath, or hereafter shall have in the right of his wife, any estate in fee-simple, fee-tail, or for term of life, of or in any rents or fee-farms, and the same rents or fee-farms now be, or hereafter shall be due, behind and unpaid in the said wife's life; then the said husband, after the death of his said wife, his executors and administrators, shall have an action of debt for the said arrearages against the tenant of the demesn that ought to have paid the same, his executors or administrators; (2) and also the said husband, after the death of his said wife, may distrain for the said arrearages, in like manner and form, as he might have done if his said wife had been then living, and make avowry upon his matter as is aforesaid.

IV. And likewise it is further enacted by the authority aforesaid, That if any person or persons which now have, or hereafter shall have, any rents or fee-farms for term of life or lives, of any other person or persons, and the said rent or fee-farm now be, or hereafter shall be due, behind and unpaid in the life of such person or persons for whose life or lives the estate of the said rent or fee-farm did depend or continue, and after the said person or persons do die, then he unto whom the said rent or fee-farm was due in form aforesaid, his executors or administrators shall and may have an action of debt against the tenant in demesn, that ought to have paid the same when it was first due, his executors and administrators, (2) and also distrain for the same arrearages upon such lands and tenements out of the which the said rents or fee-farms were issuing and payable, (3) in such like manner and form as he ought or might have done, if such person or persons by whose death the aforesaid estate in the said rents and fee-farms was determined and expired, had been in full life and not dead; and the avowry for the taking of the same distress to be made in manner and form aforesaid.

Co. Litt. 162 a. Now hath Littleton spoken of remedies for the recovery of the arrearages of rents. But since Littleton's time a right

profitable Statute in the 32 year of H. 8, hath been made for the recovery of arrearages of rents in certain cases where there lay no remedy at the common law, and giveth further remedy in some cases where at the common law there was some remedy; which Statute hath been well and beneficially expounded; and hereupon eight things are to be observed.

1. When Littleton wrote, the heirs, executors, or administrators, of a man seised of a rent service, rent charge, rent seek, or fee farm, in fee-simple or fee-tail, had no remedy for the arrearages incurred in the life of the owner of such rents. But now a double remedy is given to the executors or administrators for payment of debts, &c., viz. either to distrain or to have an action of debt.

2. That the preamble of the Statute concerning executors or administrators of tenant for life is to be intended of *tenant per aversus vie*, so long as *cestui que vie* liveth, who are also holpen by the said double remedy. But after the estate for life determined, his executors or administrators might have had an action of debt by the common law; but they could not have distrained, which now they may do by force of this Statute; for in that point it addeth another remedy than the common law gave.

3. If a man make a lease for life or lives, or a gift in tail, reserving a rent, this is a rent service within this Statute.

Co. Lrr. 47 a. First it appeareth here by Littleton that a rent must be reserved out of the lands or tenements, whereunto the lessor may have resort or recourse to distrain, as Littleton here also saith, and therefore a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corody, mulcture of a mill, tithes, fairs, markets, liberties, privileges, franchises, and the like. But if the lease be made of them by deed for years, it may be good by way of contract to have an action for debt, but distrain the lessor cannot. Neither shall it pass with the grant of the reversion, for that it is no rent incident to the reversion. But if any rent be reserved in such case upon a lease for life, it is utterly void, for that in that case no action of debt doth lie. But if a man demiseth the vesture or herbage of his land, he may reserve a rent, for that the thing is mainorable, and the lessor may distrain the cattle upon the land: and so a reversion, or a remainder of lands or tenements may be granted reserving a rent, for the apparent possibility that it may come in possession, and they are tenements within the words of Littleton.

Co. Lrr. 147 b. If a man seised of lands in fee, and possessed of a term for many years, grant a rent out of both for life in tail or in fee, with clause of distress out of both, this rent being a freehold doth issue only out of the freehold, and the lands in lease are only charged with a distress. But if he had granted the rent only out of the lands in lease for term of the life of the grantee, this had issued out of the term, and the land had been charged during the term, if the grantee lived so long.¹

¹ See *Butt's Case*, 7 Co. 23 a.

KNOLLES' CASE.

COMMON PLEAS. 1534.

[Reported Dyer, 5 b.]

Montague moved this case: One Thomas Knolles was seised of lands devisable, and made a lease for years rendering rent, and devised this rent to a stranger, and died, and the stranger is seised of the rent, and dies: Whether his heir or his executors should have this rent, or not? And BALDWIN, Chief Justice, and SHELLEY, said, that no devise lies of a rent, for that it is a new thing, to which the custom runs not. 2. And so said SHELLEY, that he was always of opinion, notwithstanding Fitzj. was contrary, that a rent-charge out of gavelkind is not departible, but if it be reserved on a lease so as it is incidental to the reversion, peradventure it is departible; and that point he would willingly learn. But as to the last point, whether the executors or the heir should have it, it is clear that the executors shall have it, for their testator never had but a chattel in it.

WALKER'S CASE.

QUEEN'S BENCH. 1587.

[Reported 3 Co. 22 a.]

THE case was in effect: Walker leased certain lands to Harris for years, the lessee assigned all his interest to another, Walker brought an action of debt against Harris for rent behind, after the assignment, and whether the action were maintainable or not, was the question. And it was objected against the action, that the land was debtor, and not the person but in respect of the land; and a difference was taken between a personal and a real contract, for if a man lets a stock of cattle or other goods for years, rendering rent at several days, he shall not have an action of debt till all the days be incurred. So if a man makes an obligation or other contract to pay several sums at several days, he shall not have an action of debt till all the days are past. But in the case of a lease for years, which is a real contract, the lessor shall have an action of debt after every day, as appears by 45 E. 3, 8; 2 E. 4, 11, which proves that the lessee is not charged in respect of any personal contract, but in respect of the realty. And therefore, when the lessee assigns over all his interest, all the realty, which always follows the land, is gone. Also, if a man sells goods for money to be paid at several days, in such case, although the goods be taken by one who hath right before the day, yet the seller shall have an action of debt in

respect of the contract: but if a man makes a lease for years rendering rent, if before the day incurred the lands be evicted by title paramount, the lessor shall not have an action of debt in respect of the contract, because it is a real contract, and follows the estate of the land, and the rent issues out of the land, and the person is not the debtor but in respect of the land; for if the lessee grants over all his interest, the lessor may have an action of debt against the assignee, with whom there was no contract by deed. But forasmuch as the rent issues out of land, the assignee who hath the land, and is privy in estate, is debtor in respect to the land: so if a man leases three acres, rendering rent, and the lessor ousts the lessee of one acre, he shall have an action of debt for no part; but if the lessor recovers part in an action of waste, or enters into part for a forfeiture, or by surrender, or by special condition for entry into part; or if part of the land be evicted by title paramount; in all these cases the rent reserved on the lease for years, which is a rent service, shall be apportioned. *Ergo*, the contract follows the land, for otherwise the lessor might in all those cases have an action of debt for the whole rent in respect of the contract, as he shall have on a sale of goods; for which matter see 20 H. 6, 23 a; 9 E. 4, 1 a; 21 E. 4, 29 a, b, which book is to be intended of a lawful entry, as for a forfeiture, or by surrender, and not of a tortious entry, 4 H. 7, 6; 7 E. 6, tit. Apportionment, Br. 26; 25 H. 8, 36; 13 H. 8; 30 H. 8, Apportionment, Br. 7; 3 H. 7, 17. And so all the books are well reconciled. So it appears, that although in every lease for years there is a contract between the lessor and lessee, yet that contract is annexed to an estate, and follows the land. So on the other side, if the lessor grants over his reversion now the contract runneth with the estate, and therefore the grantor shall not have any action of debt for rent due after his assignment, but the grantee shall have it, for the privy of the contract follows the estate of the land, and is not annexed to the person but in respect of the estate: as where there be divers parceners of an advowson, the eldest hath prerogative to make the first presentment; but it is not in respect of her person only, but as it is annexed to her estate. For as 5 H. 5, 10 b, it is agreed, her husband, who is tenant by the curtesy, shall have it: so if one coparcener hath a rent granted her for owelty of partition, she may distrain for it of common right, without any words of distress; and so shall her grantee, for it was not annexed to her person only, but to the estate also, as it is held in 21 H. 6, 11. So the grantee of a reversion and the lord by escheat shall have an action of debt for the rent, as it is held in 5 H. 7, 18 b, for the contract is incident to the estate: and it was said, that it was held by Sir Ro. Catlin, late Chief Justice, that the lessee shall not be charged for rent due after the assignment. But on great deliberation and conference with others, it was adjudged by WRAY, L. C. J., SIR THOMAS GAWDY, and the whole Court of King's Bench, that the action would lie (after such assignment).

And first for the apprehending of the true reason of this case, and of

all the other cases, which have been urged on the other side (for the law always, and in all cases, is consonant to itself), it is to be known, that as to the matter now in question there are three manner of privities, *scil.* privity in respect of estate only, privity in respect of contract only, and privity in respect of estate and contract together: privity of estate only; as if the lessor grants over his reversion (or if the reversion escheat) between the grantee (or the lord by escheat) and the lessee is privity in estate only, so between the lessor and the assignee of the lessee, for no contract was made between them. Privity of contract only, is personal privity, and extends only to the person of the lessor and to the person of the lessee, as in the case at bar, when the lessee assigned over his interest, notwithstanding his assignment the privity of contract remained between them, although the privity of estate be removed by the act of the lessee himself; and the reason thereof is, —

First, because the lessee himself shall not prevent by his own act such remedy which the lessor hath against him by his own contract, but when the lessor grants over his reversion, there, against his own grant, he cannot have remedy, because he hath granted the reversion to another, to which the rent is incident.

Secondly, the lessee may grant the term to a poor man, who shall not be able to manure the land, and who will, for need or for malice, suffer the land to lie fresh, and then the lessor will be without remedy either by distress or by action of debt, which would be inconvenient, and in effect concerns every man (for, for the most part, every man is a lessor or a lessee); and for these two reasons, all the cases of entry by wrong eviction, suspension and apportionment of rent are answered: for in such cases either it is the act of the lessor himself, or the act of a stranger; and in none of the said cases the sole act of the lessee himself shall prevent the lessor of his remedy, and introduce such inconveniences, as hath been said.

The third privity is of contract and estate together, as between the lessor and the lessee himself; and WRAY, Chief Justice, and SIR THO. GAWDY said, that as he who is a bastard born hath no cousin, “so every case imports suspicion of its legitimation, unless it has another case which shall be as a cousin-german, to support and prove it.” And therefore it was agreed by the whole court, that if there be lord and tenant, and the tenant makes a feoffment in fee, in this case betwixt them for the arrearages due as well before the feoffment as after, till notice, &c., it is only privity as to avowry, and not any privity in estate or in tenure, which privity shall not go with the estate, and yet it is more in the realty than the case at bar; *a fortiori* in the case at bar, when the lessee assigns his interest, yet privity of contract between the lessor and lessee, as to the action of debt, remains. And at the common law, before the Statute of *Quia Emptores terrarum*, if the tenant made a feoffment in fee to hold of the chief lord, the feoffee could not by any tender that he could make, compel the lord to avow on him, but the lord always might avow on the feoffor, as appears in 33 E. 3,

Avowry, 255. For by his own act he cannot change the avowry of his lord; which is a stronger case than the case at bar: and in the same case, if the lord granted over his seignior, or if the feoffor died, there the privity, as to avowry, is destroyed; for it is personal, and holds only between the lord himself and the feoffee himself: so, if after the assignment of the lease, the lessor grants over his reversion, the grantee shall not have an action of debt against the lessee, for the privity of contract, as to the action of debt, holds only betwixt the lessor himself and the lessee himself: so in such case, if the lessee dies, the lessor shall not have an action of debt against his executors; for the privity consists only between the lessor and the lessee. See for the case of avowry, Litt. Chap. Releases, 106, 107; 4 E. 3, 22; 2 E. 4, 6; 34 H. 6, 46; 37 H. 6, 33; 7 E. 4, 28; 24 H. 8, Dy. 4; 29 H. 8, tit. Avow. Br. 111.

So if tenant in dower, or tenant by the curtesy, grants over their estate, yet the privity of action remains between the heir and them, and he shall have an action of waste against them for waste committed after the assignment: but if the heir grants over the reversion, then the privity of the action is destroyed, and the grantee cannot have any action of waste, but only against the assignee; for between them is privity in estate, and between the grantee and the tenant in dower, or tenant by the curtesy, is no privity at all. See F. N. B. 56, f. temp. E. 1, Waste, 122; 18 E. 3, 3; 30 E. 3, 16; 36 or 38 E. 3, 23; 11 H. 4, 18. And it was agreed, that if the lessor enters for condition broken, or if the lessee surrenders to the lessor, now the estate and term is determined, and yet the lessor shall have an action of debt for the arrearages due before the condition broken, or the surrender made, as it appears by F. N. B. 120; 30 E. 3, 7; 6 H. 7, 3 b; F. N. B. 122 (against the book of 32 E. 3 Bar. 262, which is not law), and that in respect of the contract between the lessor and the lessee. Note, reader, so great was the authority and consequence of this judgment, that after this time, not only the point adjudged hath been always affirmed, but also all the differences in this case taken by WRAY, C. J., and the court have been adjudged, as you may learn by the cases following Hil. 36 Eliz. in the K.'s B. Rot. 420, between *Ungle* and *Glover* it was adjudged, that if the lessee for years assigns over his interest and the lessor by deed indented and enrolled according to the Statute, bargains and sells the reversion to another, that the bargainee shall not have an action of debt against the lessee, for there is no privity betwixt them. But it was unanimously agreed by POPHAM, Chief Justice, CLENCH, GAWDY, and FENNER, Justices, that after the assignment the lessor himself might have an action of debt against the lessee for rent due after the assignment. Trin. 37 Eliz. in the King's Bench, Rot. 1042, between *Overton* and *Sydhall*, two points were resolved by POPHAM, C. J., and the whole court.

1. That if the executor of a lessee for years assigns over his interest, that an action of debt doth not lie against him for rent due after the assignment.

2. If the lessee for years assigns over his interest, and dies, the executor shall not be charged for rent due after his death; for, by the death of the lessee, the personal privity of contract, as to the action of debt in both cases, was determined. And Mich. 40 & 41 Eliz. between *George Brome, Esq.*, plaintiff, and *Hore*, defendant, the case in effect was such: A. leased to C. 3 acres of land for years rendering rent, the said C. assigned all his estate in one acre to another, A. suffered a common recovery to the use of B. in fee, who brought an action of debt against the first lessee, and it was adjudged by POPHAM, C. J., and the whole court, that the action did lie; for inasmuch as the lessee had assigned his interest but in part, and remained possessed of the residue, that not only the lessor, but also his assignee, or he who claimeth under him shall have an action of debt for the whole rent against the lessee, for there was not privity of contract only, but also privity in estate and contract together; and therefore the action in this case shall go with the estate; as at common law, if before the Statute of *Quia Emptores terrarum* the tenant had made a feoffment in fee of part of the tenancy, there was not any apportionment, but the lord, or his grantee, should avow on the feoffor for as much as he remained tenant in respect of the residue: but if he had made a feoffment of the whole, then the grantee of the lord should not avow on him, as it hath been said before. See 22 Ass. 52; 24 H. 8, 4 b; 32 H. 8, Br. Accept. for this matter. And POPHAM, C. J., in this case said, that in case when rent reserved on a lease for years shall be apportioned, if in an action of debt the lessor demands more *quam oportet*; yet on *nihil debet* the lessor shall recover as much as shall be apportioned and assessed by the jury, and shall be barred for the residue. And Pasch. 41 Eliz. Rot. 2485, in the Common Pleas, *Samuel Marrow* brought an action of debt against *Francis Turpin* and *W. Turpin*, administrators of *Geo. Turpin*, and declared on a demise made by the plaintiff by deed indented of certain land to the intestate for years rendering rent, and for rent behind after the death of the intestate, the action was brought; the defendants pleaded, that before the rent behind, one of the defendants had assigned all his interest to *Thomas Boorde*, of which assignment the plaintiff had notice, and accepted the rent by the hands of the assignee, due at a day after the assignment, and before the day on which the rent was due which is now demanded, upon which the plaintiff did demur. And it was adjudged against the plaintiff, because the privity of the contract, as to the action of debt, was determined by the death of the lessee; and therefore, after assignment made by the administrator, debt did not lie against the administrator for rent due after the assignment, according to the judgment given in *Overton and Sydhall's Case* before.

Also it was said, if the lessee assigns over his term, the lessor may charge the lessee or his assignee at his election; and therefore if the lessor accepts the rent of the assignee, he hath determined his election, and shall not have an action against the lessee afterwards for rent due after

the assignment, no more than if the lord once accepts the rent of the feoffee, he shall not avow on the feoffor; and by these judgments and resolutions you will the better understand your books; betwixt which *prima facie* seems to be some diversity of opinions. *Vide* 44 E. 3, 5, & 44 Ass. 18; 9 H. 6, 52, by Paston, which agree with the judgment of Sir Christopher Wray. See 8 Eliz. Dyer, 247, and the *quære* there made is now well resolved.

READE v. JOHNSON.

COMMON PLEAS. 1591.

[*Reported Cro. El.* 242.]

ASSUMPSIT for twenty-four pounds. And declares upon an *indebitatus assumpsit*. Defendant pleads *non assumpsit*. The jury found, that the plaintiff let to the defendant land for seven years, rendering eight pounds *per annum*, and the rent was arrear for three years; and that the defendant did owe no other debt, nor made any other promise. *Et si, &c.* — And it was held by the JUSTICES, that the action did not lie, but only an action of debt.

HUMBLE v. GLOVER.

QUEEN'S BENCH. 1594.

[*Reported Cro. El.* 328.]

DEBT upon a lease for years, made by Tho. Play to the defendant. And declares upon an assignment of the reversion by indenture of bargain and sale enrolled. The defendant pleads, that after the grant of the reversion, and before any rent arrear, he assigned over his term to — Scotmead, and doth not name his Christian name; but a blank was left for it. Upon this plea it was demurred.

First Point. If the lessee shall be charged with the rent after the assignment of his term? — And resolved he should not. *Vide* 3 Co. 23 b, for there is no privity between the bargainee and lessee, but by reason of the privity of estate, which being gone, the lessee is not chargeable: but between the lessor and lessee he shall not discharge himself, by assigning over his term; for the privity is by reason of the contract and reservation, rather than by the occupation of the land; which by his own act he shall not discharge: but in this case the privity is destroyed.¹

¹ The rest of the case is omitted.

ARDS v. WATKIN.

QUEEN'S BENCH. 1598, 1599.

[Reported Cro. El. 637, 651.]

UPON demurrer the case was, lessee for thirty years of a parcel of land called Shortwood, lets it for twenty-eight years, rendering £34 rent *per annum*, and after deviseth £28 parcel of that rent to his three sons, severally to every of them a third part. One of them brings debt for his part of the rent: and, Whether this action lay or not? was the question. — It was argued by *Rydgley* for the plaintiff, and by *Nichols* for the defendant. GAWDY and FENNER held, that the action well lay; for there is no doubt but that rent may be devised, and be divided from the reversion; for it is not merely a thing in action, but *quasi* an inheritance, as *Knowles' Case*, Dyer, 5 b, is; and in 24 Hen. 8, *Rysden's Case*, Dyer, 4 b. If lessee grants over all his term in part of the land, yet it is chargeable in an action with the entire rent; for he by his act cannot apportion it. And by the grant of part the lessee is not compellable to attorn; for then he should be liable to two actions, or two distresses. But the devise is *quasi* an act of law, which shall inure without attornment, and shall make a sufficient privity, and so it may be well apportioned by this means. Wherefore, &c. — POPHAM and CLENCH, *e contra*. For as the lessee by his own act shall not divide the lessor's contract, nor apportion his action; so likewise the law favors the lessee, that the act of the lessor shall not charge him with divers actions, or double distresses, but upon his voluntary attornment; and the contract being entire cannot be apportioned. But POPHAM agreed, that the rent was well devisable, and by that means severable from the reversion. And although a thing in action cannot be transferred over, nor be devised; yet a contract, which ariseth from an interest in land, or which is an interest, may be well transferred over. Wherefore, &c. — *Adjournatur*.

The case was now moved again; and GAWDY and FENNER, and CLENCH agreeing with them, held that the devise was good, and well severable; for as to that objection, that a mischief may happen to the tenant, that he shall be subject to two actions and distresses, that is his own fault; for if he pays his rent, he shall avoid it: and the same mischief is, where he deviseth part of the reversion and rent, which is agreed on the other part to be well enough; and although a contract, or a thing in action, cannot be transferred nor divided, yet rent only may be. For it is a thing in possession; for he doth not grant the action, but the law gives it as incident to the rent. And *Huntley's Case*, 10 Eliz. Dyer, 326. is express, where a devise was of a reversion upon a lease for years,

with the rent, to a man and his sister, and the heirs of their bodies ; the sister dies without issue ; the brother dies having issue ; the heir had the moiety of the rent. — POPHAM *e contra*. For the difference will be, when part of a reversion and rent is granted, that is good ; but when the rent is severed from the reversion, it is otherwise : for then it is but in nature of an annuity, which cannot be granted by parcels, but entirely ; but an annuity or rent only are grantable over, because they are things of continuance, and are not personal. And the reason of *Huntley's Case* is, because the rent is divided with the reversion. But notwithstanding, in regard three of them agreed, he consented that judgment should be entered for the plaintiff. — NOTE. That in the argument of this case, a case was cited in this court, Easter Term, 28 Eliz. Roll. 344, where a devise was of an entire reversion and rent, which was void for a third part ; because it was holden *in capite*, and debt was brought for two parts of the rent, and adjudged maintainable.

PINE v. LEICESTER.

COMMON PLEAS. 1613.

[Reported Hob. 37.]

HUGH PINE of Lincoln's Inn brought an action of debt in the county of — against the Countess of Leicester, and declares that the Earl of Leicester, being seised in fee of the manor of Cleobury in the county of Salop, granted a rent charge of 100 pounds *per annum*, out of the manor unto one Foster and his wife for their lives, and then lays the death of the Lord of Leicester, and how the manor came to my lady, and then the death of Foster and his wife last. And now he, as executor to Foster and his wife, brought this action for arrearages of rent incurred in their life, while the manor was in the hands of the lady ; and this action being laid in a county, where it was supposed Pine was strong, it was moved to be laid in a more indifferent shire. Whereupon I said, that they were not well advised ; for this kind of action of debt was local, and must needs be laid where the land was, because the lady was not chargeable, but in respect of the possession ; whereupon Sergeant Harris, being not of counsel in this case, confessed it had been so adjudged in another case.

MARSH v. BRACE.

KING's BENCH. 1614.

[Reported Cro. Jac. 334.]

DEBT upon a lease for years, demanding rent for two years and a half ending at the Annunciation last past.

The defendant pleaded, that before any rent due, he assigned his estate and interest to J. S. who paid the rent to the plaintiff for half a year due after the assignment, which he accepted from his hands.

The plaintiff thereupon demurred, because it is not alleged that he gave notice to him that he was assignee; and also, because the contract continues betwixt the lessor and lessee during the term, notwithstanding this assignment.

But all the COURT resolved, that this assignment and acceptance of the rent from the hands of the assignee is notice in itself, and an agreement that he is his tenant, and then he may not afterwards resort back to the lessee: and the bar is good to a common intent; and it shall not be intended but that he knew him to be his tenant, and accepted him as his tenant, unless the contrary be shown. Wherefore it was adjudged for the defendant, if other matters were not shown, &c.

TUTTER v. FRYER.

COMMON PLEAS. 1621.

[Reported Winch, 7.]

A RENT charge was granted for years with a *nomine pœnæ*, and a clause of distress if that was not paid at the day; and the rent was behind, and the years incurred; and it was moved by *Athowe*, that though the years are incurred, that he may distrain for the *nomine pœnæ*, but the COURT was of a contrary opinion, for that depends upon the rent, and the distress is gone as to both of them.

BORD v. CUDMORE.

KING's BENCH. 1630.

[Reported Cro. Car. 183.]

ERROR of a judgment in debt in the Common Pleas. The error assigned was, because debt was brought in London by Cudmore as assignee of J. S. of a reversion of land in the county of Somerset, upon a lease for years made at London of the said lands, rendering the rent

of twenty pounds yearly at the Temple Church, London, supposing the lease to be made at the parish of St. Mary Bow, in the ward of Cheap, London, for two years rent behind after the assignment of the reversion and attornment thereto; whereas the action ought to have been brought in the county of Somerset, where the land lies, because the privity of contract failing by assignment of the reversion, he is only to maintain the action upon the privity in law for the interest of the reversion, and that ought to have been brought in the county of Somerset, where the land lies.

And this was agreed on the other side, unless the rent had been reserved payable at London, and in that case the action may be laid in London, for payment might have been there pleaded, and upon *nil debet* those in London might best take cognizance of the payment; and therefore the judgment was well given, and not error.

But all the Court conceived, forasmuch as the privity of the contract is gone by the assignment of the reversion and the attornment, and the rent follows the land, the plaintiff being only entitled thereunto by reason of his having the land, therefore the action ought to have been brought only in the county where the land lies, and not elsewhere: whereupon the judgment was reversed.

TURNER v. LEE.

KING'S BENCH. 1637.

[Reported Cro. Car. 471.]

REFLEVIN. The defendant avows as executor for the arrears of a rent charge granted to the testator for divers years, if he lived so long. The plaintiff takes issue, *quod non concessit*; and found for the avowant.

And after verdict it was moved in arrest of judgment by *Rolle*, that this avowry was not good, because the rent granted for years being determined, the executor cannot, by the Statute of 32 Hen. 8, c. 37, distrain; for that Statute extends to those who have rent for life or inheritance.

But *Henden*, Serjeant, said, that it is within the equity of the Statute, because the estate is determinable upon a life; and if it were not good, yet being admitted, and the issue being upon the grant, and found, it is good enough.

But all the Court resolved, that it is not within the Statute, for that provides remedy where the testator died seised of a rent to him and his heirs, or for life, and by his death there was not any remedy for the executor, as it appears by the preamble of that Statute; but where he hath remedy by the common law by action of debt, as in this case the executor hath, he cannot distrain; and although the issue is upon a *non concessit*, and it is found *quod concessit*, yet it being an ill avowry in substance, judgment shall be given against him.

THURSBY v. PLANT.

KING'S BENCH. 1669.

[Reported 1 Lev. 259.]

COVENANT, and declares, That the Earl of Lincoln was seised of lands in Lincolnshire; and at London made a lease rendering rent, and that the tenant covenanted to pay the rent, and that afterwards the Earl granted the reversion to the plaintiff, and for non-payment of the rent the action was brought and laid in London. The defendant pleads a surrender, on which issue was, and a verdict for the plaintiff; and it was moved in arrest of judgment, That the action being brought by the assignee of the reversion ought to be laid in Lincolnshire, where the land lies (upon the privity of the estate), and not at London (upon the privity of contract), where the lease was made, and cited 1 Cro. *Bord* against *Cudmore*; debt for rent ought to be brought by the assignee in the county where the land lies, on the privity of estate: to which it was answered and resolved by the whole Court, that debt is maintainable only upon the privity of estate, and goes with the reversion at common law, and that an assignee could maintain it before the Statute upon the privity of estate, and perception of the profits; but covenant did not go to the assignee before the Statute, because it lies only on the privity of contract; and though now by the Statute the covenant passes to the assignee, yet the nature thereof is not altered by the Statute, but it is assignable only as a contract, and therefore ought to be brought where the contract was made; and there is a great difference between debt for the rent which arises out of the profits of the land, and covenant which is a collateral thing, on which only damages are to be recovered. 2 Cro. *Batchellor* against *Gage*. Covenant lies against the lessee after assignment of the term, and acceptance of the rent from the assignee; but debt does not lie. 2 Cro. *Brett* against *Cumberland* and *Hill*, 15 Car. 2 B. R. Rot. 1258. That covenant lies on the privity of contract after assignment: whereupon judgment was given here for the plaintiff by the whole Court, on which the defendant brought a writ of error. But as I heard the parties agreed.

Jones, for the plaintiff.

Sanders, for the defendant.

JOHNSON v. MAY.

COMMON PLEAS. 1683.

[Reported 3 Lev. 150.]

ASSUMPSIT, in consideration the defendant having surrendered a copyhold estate, and a *Boone adinde spectan'* to the plaintiff, which the plaintiff should permit the defendant to enjoy from the 10th of Aug. Anno 38 *Regis nunc* till the first of May next following, that he promised to pay the plaintiff 50s. and shows, that he permitted, and the defendant had not paid the 50s. Also he declares upon a *quantum meruit* for the same. As to the *quantum meruit*, the defendant pleaded *non assumpsit*; and as to the other part demurs. The case was argued in Trinity Term, when PEMBERTON was Chief Justice, and now again this term, JONES being Ch. Justice. For the defendant it was urged that here is a term for years, and a rent reserved, for which debt lies and not this action; for which was cited 1 Roll. Abr. 7, divers cases to this purpose; Cro. Cha. 343, *Brett and Read*; and 1 Lev. 204, *Chapman v. Southwicke*; 1 Sid. 279, *Norton v. Grobhamhow*; 1 Roll. Abr. 9, and that Hale, Chief Justice, was always of this opinion. On the other side for the plaintiff were cited Cro. Eliz. 118, *Hunt v. Sone*; Cro. Ja. 598, *Darnall v. Morgan*; Cro. Cha. 114, *Acton v. Simon*; and *Mansell's Case* cited in *Brett and Read's Case*; Lit. Rep. 68, *Wentworth v. Abraham*; Cro. Eliz. 859, *Clerk v. Pallady*. And because this had been *vezata questio*, the Court took time to deliver their opinions; and accordingly it was so done by all the four Justices, who all agreed that the action lay. For 1. An express promise shall be intended, and not a bare promise in law arising upon the contract, which all agree will not lie; and if *non assumpsit* had been pleaded, there must have been proof of an *express* promise. 2. There being an express promise it is collateral, and *quasi* a special agreement to pay the rent, of the same effect as an express covenant in a lease by deed. And as to the objection, *non constat* what a boon is, and therefore neither debt, nor *assumpsit*, nor ejectment will lie upon a lease thereof, it was answered that be it what it will, it is belonging to the land, and that will support an action of debt, as where there is a lease of land and the stock of sheep. *And judgment was given for the plaintiff.*

NEWCOMB v. HARVEY.

KING'S BENCH. 1690.

[Reported Carth. 161.]

THE plaintiff being lessee for years, assigned over his whole term, by indenture, to the defendant, rendering rent, and an action of debt was now brought for the rent in arrear.

The defendant pleaded *non concessit et hoc, &c.*

And upon a demurrer to this plea, it was objected in behalf of the defendant, that this action would not lie, because the sum reserved was not properly any rent, but a sum in gross, the plaintiff having assigned over his whole term, and by consequence had no reversion, and therefore the action ought to be for a sum in gross upon the contract (and not debt for rent), and that would not lie till the last day expires.

To which it was answered, and so resolved PER CURIAM, that this is a rent, though the plaintiff had no reversion; for if a rent is reserved upon a feoffment in fee, there is no reversion in the feoffor; but yet this is a rent, and recoverable by the name of a rent upon the contract, and so it shall be in the principal case.

Moreover, if the defendant had assigned over the term to another, an action of debt would lie for the plaintiff against the second assignee.

The plaintiff had judgment.

HOOL v. BELL.

COMMON PLEAS. 1697.

[Reported 1 Ld. Raym. 172.]

REPLEVIN for horses taken by the defendant in a place called The Stable in Yorkshire. The defendant made conusance as bailiff to Robert Knowles; and shows, that the Lord Stafford was seised of the manor of Tinsley in Yorkshire, with the appurtenances in fee, whereof the place where, &c., is parcel, and being seised, the sixth of March, 22 Car. 2, granted to Francis Knowles a rent-charge of £60 *per annum* payable yearly, with clauses of distress, in the manor of Tinsley, for life, &c., that Francis Knowles made his will, and made his brother Robert Knowles his executor, and died; that Robert Knowles proved the will; and that for arrears of this rent-charge, incurred in the life of the testator, the defendant, as bailiff to Robert Knowles, took these horses in the place where, &c. as a distress, as in parcel of the lands and tenements *prædicto Roberto Knowles ut executori Francis: Knowles secundum formam statuti oneratorum et obligatorum.* The

plaintiff demurred. And *Pemberton*, Serjeant, for the plaintiff argued, that this avowry was ill; for the executor of tenant for life is not within the Statute of 32 Hen. 8, c. 37. For the Statute recites, that, forasmuch as executors had no remedy by the common law for arrears of rent; this Act gives them a double remedy, viz., distress or debt. But the executors of tenant for life had debt at common law for rent incurred in the life of the testator. And therefore Co. Lit. 162 a, says, that tenant for life must be intended tenant *pur antea vic*, so long as *cestui que vie* lives in this Act. So Cro. Car. 339, *Turner v. Lee*, the judges laid down a rule, that where the executor, &c., had remedy by debt at common law, this Statute did not give him distress. Therefore in the principal case the executor having remedy by debt by the common law for the arrearages in the time of the testator, who was tenant for life, he has no remedy by distress given by this Act. *Sed non allocatur*. For PER CURIAM, this Act of 32 Hen. 8 is a remedial law, and shall extend to the executors of all tenants for life; and the law has been taken so always since the Statute, and has never been questioned. And the words of the Statute are general enough to extend to all. And in Cro. Eliz. 332, *Lambert v. Austin*, this seems to be admitted, and therefore the rule in Cro. Car. 339, so generally taken, cannot be law.¹

BREWSTER v. KIDGILL.

KING'S BENCH. 1698.

[Reported 12 Mod. 166.]

CASE, upon a wager concerning a rent-charge of forty pounds a year, whereof the plaintiff, as son and heir of Ellen Brewster, is seised in fee by virtue of a grant to her and her heirs, issuing out of a manor, of which Kidgill is terre-tenant; that the defendant affirmed, it was lawful for him to deduct four shillings in the pound for Parliamentary taxes, which the plaintiff denied, &c. And upon issue joined, a special verdict was found, that on the twenty-sixth of November, 1649, Robert Langford was seised in fee of the manor of B., and that in consideration of eight hundred pounds paid by Ellen Brewster, he granted to her and her heirs a rent-charge in fee of forty pounds *per annum*, with a covenant in the deed for further assurance; and on the back of the deed this indorsement was: "Memorandum, It is the true intent and meaning of these presents, that the grantee and her heirs shall forever hereafter be paid the said rent-charge, without any deduction or abatement of taxes, charge, or payment out of, for or concerning the said rent, or the said manor or lands charged herewith." And afterwards in 1652, for further assurance, granted and confirmed the rent afore-

¹ The rest of the case is omitted.

said to Ellen Brewster, and her heirs, with a *nomine pœnæ*; and Robert Langford covenants, that at the sealing thereof he was seised in fee, and that it was free from all incumbrances, and that he had power to charge the same; and that the said yearly rent of forty pounds *per annum*, freed from all taxes, shall be forever hereafter duly paid at the time and place for the payment thereof, &c.

The question was, Whether the grantor of the rent, and his heirs, shall be obliged to pay the said rent, without any deduction for, or by reason of any tax imposed by Parliament futuramente on the said rent?

HOLT, Chief Justice, delivered the opinion of the court, that the covenant doth oblige the grantor and his heirs without deduction. The case is of very great consequence, and has been a question a long time, whether such covenants extend to all future parliamentary taxes whatsoever; which I think would be very hard, and I can by no means agree thereto in this large sense; but as the nature of this case is, we are all of opinion, that it extends to all those sorts of taxes that shall be given by future Acts of Parliament.¹

There is another matter in which I have not consulted my Brothers, and that is, whether the terre-tenant in this case is obliged by the covenant: this is a covenant by the grantor of the rent, who was seised in fee of the manor. Now who this terre-tenant is does not appear, whether he be heir or assignee; for if he be assignee, I do not think him chargeable in law; for this covenant does not run with the land. Hard. 87. I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted; but that covenant should run with the rent against the assignee of the land, I see no reason. If this rent was granted so to be paid, it would be another matter; but here is only a covenant, and no words amounting to a grant; and therefore there can be no relief in this case against the terre-tenant, but in equity; and therefore for this point I do not see how the plaintiff can have his judgment; for if this covenant should charge the land, it would be higher than a *warrantia chartæ*, which only affects the land from the judgment therein given.

But the other three judges thought that this covenant might charge the land, being in nature of a grant, or at least a declaration going along with the grant, showing in what manner the thing granted should be taken, and reckoned the indorsement as part of the deed.

And so judgment was given for the plaintiff.²

¹ The part of the opinion in which this is discussed is omitted.

² *s. c. sub nom. Brewster v. Küchen*, 1 *Ld. Raym.* 317, where the discussion on the running of the covenant is thus given: "But he [HOLT, C. J.] then made another question, which was not observed at the bar, nor by any of the other judges, viz., whether the terre-tenant is liable to an action upon this covenant; and he was of opinion, that he was not. For (by him) if tenant in fee grants a rent-charge out of lands, and covenants to pay it without deduction, for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against the assignee; for it is a mere personal covenant, and cannot run with the land. Warranty, which is a real

ST. 8 ANNE, c. 14, § 4. And whereas no action of debt lies against a tenant for life or lives, for any arrears of rent, during the continuance of such estate for life or lives, be it enacted by the authority aforesaid, That from and after the said first day of May, it shall and may be lawful for any person or persons, having any rent in arrear or due upon any lease or demise for life or lives, to bring an action or actions of debt for such arrears of rent, in the same manner as they might have done, in case such rent were due and reserved upon a lease for years.

§ 6. And whereas tenants *pur autre vie* and lessees for years, or at will, frequently hold over the tenements to them demised, after the determination of such leases: and whereas after the determination of such, or any other leases, no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof; it is hereby further enacted by the authority aforesaid, That from and after the said first day of May, one thousand seven hundred and ten, it shall and may be lawful, for any person or persons, having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined.

§ 7. *Provided*, That such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due.

ST. 4 GEO. II. c. 28, § 5. And whereas the remedy for recovering rents seck, rents of assize, and chief rents, are tedious and difficult, be it therefore enacted by the authority aforesaid, That from and after the twenty-fourth day of June one thousand seven hundred and thirty-one, all and every person or persons, bodies politic and corporate, shall and

covenant, will never bind the land of the warrantor, until judgment had in *assumpsit chartæ*; much less will this personal covenant bind the land. And for a case in point, he cited Hardr. 87, pl. 5, *Coke* and the *Earl of Arundel*. In replevin, if the defendant had avowed for arrears of this rent, and the plaintiff had pleaded in bar, *riens arrere*; the avowant could not have replied this covenant against the *terre-tenant*; but if the avowry had been upon the grantor, or his heirs, the avowant might have replied this covenant against them, to avoid circuity of action. Therefore, since it does not appear that the defendant is bound by this covenant (for *non constat* whether he is *terre-tenant* or not, or what he is) for this reason he was of opinion, that judgment ought to be given for the defendant. But the other three judges seemed to be in a surprise, and not in truth to comprehend this objection, and therefore they persisted in their former opinion, talking of agreements, intent of the party, binding of the land, and I know not what. They gave judgment for the plaintiff, against the opinion of Holt, Chief Justice, for the reason aforesaid."

See 1 Sm. L. C. (9th ed.) 91; Sugd. V. & P. (14th ed.) 593-596. A covenant to pay a fee farm rent was held to run against an assignee of the covenantor in *Van Rensselaer v. Read*, 26 N. Y. 558 (1863), and *Strooper v. Fisher*, 1 Rawle, 155 (1829).

See cases under covenants running with the land, *ante*, pp. 439 *et seq.*

may have the like remedy by distress, and by impounding and selling the same, in cases of rent seck, rents of assize, and chief rents, which have been duly answered or paid for the space of three years, within the space of twenty years before the first day of this present session of Parliament, or shall be hereafter created, as in case of rent reserved upon lease; any law or usage to the contrary notwithstanding.

FALHERS v. CORBRET.

KING'S BENCH. 1734.

[Reported 2 Barnard. 386.]

IN a writ of error in a judgment in the Common Pleas, in an *indebitatus assumpsit*, it appeared that the plaintiff below had declared, that whereas he was possessed of a house in Newgate Market, in consideration that he would permit the defendant, being a butcher, to have the use of the passage in it for hanging up his meat, he would pay him at the rate of 80s. per year for the same; the plaintiff averred that he did let the defendant have the use of this passage for a year and half, by reason of which there was the sum of £2 5s. due to him. Issue was joined on *non assumpsit*, and a verdict found for the plaintiff. *Mr. Strange* submitted it, that debt for rent ought to have been brought, and that an *indebitatus assumpsit* would not lie. *Mr. Parker*, on the other side, said that he conceived that this was not a rent, by reason that no part of the house was let, but merely the use of the passage agreed for; he conceived, therefore, that debt for rent would not lie. He observed further, that this agreement being to pay after the rate of such a sum, was another reason why such action could not be maintained. And for this purpose he cited 4 Mod. 78. But though such action would have lain, yet upon an express promise an *indebitatus assumpsit* will lie likewise; and for this purpose cited Hardress, 366. The COURT was of the same opinion; accordingly affirmed the judgment.

ST. 11 GEO. II. c. 19, § 14. And to obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed, be it further enacted by the authority aforesaid, That from and after the said twenty-fourth day of June, it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant or defendants, in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered.

— v. COOPER.

COMMON PLEAS. 1768.

[Reported 2 Wils. 375.]

IN replevin, the defendant avows under a distress for rent due from the plaintiff to him upon an assignment of a lease of a term for years to the plaintiff, in which assignment there is no clause of distress; the single question is, Whether this is such a rent for which a distress lies, there being no reversion in the defendant. It was said for the defendant, that although rent be incident to the reversion, yet it is not an inseparable incident, and therefore it may be severed from the reversion; and although there is no clause of distress in the assignment of the term, yet the rent reserved thereupon may be considered as a rent-seck, and distrained for by the Statute 4 Geo. 2, c. 28, § 5, and that it appears clearly to be the intent of the parties that the plaintiff should pay rent to the defendant; this case was so clear that the court gave judgment for the plaintiff without hearing his counsel.

CURIA. There are two ways of creating a rent: the owner of the lands either grants a rent out of it, or grants the lands and reserves a rent; there is no such thing as a rent-seck, rent-service, or rent-charge issuing out of a term for years. Bro. Dette, pl. 39, cites 43 Ed. 3, 4, *per* Fynchden, Ch. Justice C. B. If a man hath a term for years, and grants all his estate of the term rendering certain rent, he cannot distrain if the rent be in arrear; this case is law and in point: therefore if the avowant will recover what is owing to him from the plaintiff, he must bring his action upon the contract.

Judgment for the plaintiff per totam curiam.

STROUD v. ROGERS.

COMMON PLEAS. 1792.

[Reported 6 T. R. 63, note.]

IN that case the third count was precisely similar to the present: ¹ the defendant demurred to it, and assigned for causes that it did not set forth any demise of the premises, nor for what term they were demised, nor what rent was payable, nor for what length of time the defendant held and occupied the premises, nor when the sum of £5 thereby supposed to be due became due, nor for what space of time; but after argument the Court of Common Pleas gave judgment for the plaintiff on that account.

¹ I. e. *Wilkins v. Wingate*, 6 T. R. 62, to the report of which this note is appended. The third count in *Wilkins v. Wingate* was for use and occupation for £10 for half a year.

STEVENSON v. LAMBARD.

KING'S BENCH. 1802.

[Reported 2 East, 575.]

THE plaintiff declared in covenant against the defendant as assignee of one Charles Dixon, upon an indenture made on the 1st of May, 1798, whereby the plaintiff, for the considerations therein mentioned, demised to Dixon and his assigns two messuages and a warehouse therein described, to hold from the 25th of March then last past, for the term of thirty-one years, at the yearly rent of £105 by equal quarterly payments, viz. &c. The declaration then set forth the covenant by Dixon for himself and his assigns, &c. to pay to the plaintiff the said yearly rent at the times and in the manner above mentioned; and that Dixon entered and was possessed, &c.; and that afterwards, on the 28th of March, 1801, all the right, title, &c., and term of years then to come and unexpired in the said demised premises, vested by assignment in the defendant, who by virtue thereof entered, and became and was possessed for the residue of the said demised term then unexpired; and then assigned a breach for non-payment of one year's rent, which became due on the 20th September, 1801, since the said assignment. Pleas, 1. *Non est factum*; 2. That all the interest and title, &c., of Dixon did not vest by assignment in the defendant; 3. No rent in arrear: on all which issues were joined. The defendant then pleaded, 4thly, That as to so much of the said supposed breach of covenant above assigned, as relates to the non-payment of the sum of £52 10s., parcel of the said £105, of the rent supposed to become due on the 29th September, 1801, for one half year of the said term, *actio non*, &c., because one John Walker, before and at the time of making the said indenture, &c., and from thence until, upon, and after the said 29th September, 1801, was seised in fee of one undivided moiety of the said demised premises, and brought an ejectment in K. B. in Hil. 41 Geo. 3, against the present plaintiff for the recovery of the same; in which ejectment the demise was laid before any of the said £52 10s. parcel of the rent aforesaid became due, &c., and such proceedings were afterwards had, &c., that Walker in Easter Term, 41 Geo. 3, recovered judgment against the present plaintiff in the said ejectment, for the said undivided moiety of the demised premises, and afterwards, viz. on 21st of April, 1801, sued out a writ of *habere facias possessionem* upon the said judgment, under which the sheriff, before any part of the said £52 10s. parcel, &c., became due, delivered possession, &c., to Walker, who thereupon entered into the said undivided moiety, &c., and ejected the defendant, &c. There was a similar plea, stating generally the paramount title of Walker, and his ejection of the defend-

ant from one moiety of the demised premises. To these there was a general demurrer and joinder.

Marryat, in support of the demurrer.

Lawes, contra.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J., now delivered the judgment of the court:—

This is an action of covenant by the lessor against the assignee of the lessee for non-payment of a year's rent. Plea as to rent for half a year claimed, eviction during that time of a moiety of the premises by title paramount. To this there is a demurrer: and the question is, Whether the rent be apportionable in this action of covenant by the lessor against the assignee of the lessee? It clearly is so upon an action of debt, or upon an avowry in replevin, by all the authorities: and the only question is, Whether it be so in covenant? In covenant, as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory as any other personal contract is, the rent is not apportionable. Bro. Contract. pl. 16; Moor, 116; Finch's Law, lib. 2, c. 18. But an action of covenant against an assignee differs essentially from a mere covenant personal: it is in such case properly a real contract in respect of the land; it is local in its nature, and not transitory. In *Barker v. Damer*, Carth. 183, it is said to be "adjudged in several of our books¹ that an action of debt for rent against an assignee of a term is local, and will lie nowhere but in that county where the lands are. And the same reason holds in covenant against the assignee; for this action as well as that of debt is maintainable only upon the privity of estate, and the defendant is merely charged thereby, because it is a covenant which runs with the land; for if it had been a collateral covenant, the assignee would not have been bound by it; and that proves that the action is local only with respect to the land." The objection as to the locality of this species of action of covenant, as against an assignee, was only gotten over in the case of the *Mayor of London* against *Cole*, 7 Term Rep. 587, by the help of the Stat. 16 and 17 Car. 2, c. 8, as being a mistrial cured by verdict. So covenant will lie against the assignee of part of an estate for not repairing his part; "for it is dividable, and follows the land," with which the defendant as assignee is chargeable by the common law, or by the Stat. 32 H. 8, c. 37. *Congham v. King*, Cro. Car. 222. Upon the whole, therefore, we think that the condition of this assignee is in point of law different from that of a lessee chargeable on the privity of contract; and being chargeable on the privity of estate, and in respect of the land, his rent is upon principle apportionable as the rent of a lessee is, or as his rent would be in an action of debt or replevin.

*Judgment for the plaintiff; with leave to the defendant to amend his plea, and to plead it only to one moiety of the rent.*²

¹ *Vide* all the cases collected by Serjt. Williams in a note to the case of *Thursby v. Plant*, 1 Saund. 241 b. — REP.

² But see *Sicasse v. Thomas*, 10 Q. B. D. 48.

NEWMAN v. ANDERTON.

COMMON PLEAS. 1806.

[Reported 2 B. & P. N. S. 224.]

REPLEVIN. The plaintiff in his declaration complained that the defendant took certain goods and chattels of the plaintiff in a bedroom and shop, and unjustly detained them, against sureties and pledges. The defendant avowed the taking in the bedroom, because "the plaintiff, for the space of sixteen weeks and more next before, and ending, &c., enjoyed the said bedroom in which, &c., together with a certain other room and apartment, also being in and part and parcel of the said dwelling-house in the declaration mentioned, with certain furniture and effects with which the said bedroom in which, &c., and the said other room and apartment, with the appurtenants, were furnished under a demise thereof theretofore made by the defendant to the plaintiff, at the weekly rent of 13s. of lawful money of Great Britain payable weekly on the Thursday in every week, and during all that time held the same of the defendant by virtue of the said demise, as his tenant thereof." And because £12 were in arrear, avowed the taking and prayed a return.

The plaintiff took judgment for so much as related to the shop; and as to the avowry, pleaded that he did not hold the said bedroom together with the said other room and apartment in the said declaration mentioned, and certain furniture and effects with which the said other room and apartment were furnished under a demise thereof theretofore made by the defendant to the plaintiff, at the weekly rent of 13s. payable on the Thursday in every week in manner and form, &c.

On this plea issue was joined.

At the trial before *Sir James Mansfield*, C. J., at the Westminster Sittings after last Hilary Term, a verdict was found for the defendant.

A rule having been obtained, calling upon the defendant to show cause why this verdict should not be set aside, upon the ground that the defendant could not be entitled to distrain for the rent of ready furnished lodgings,

Vaughan, Serjt., now showed cause.

Best, Serjt., *contra*.

SIR JAMES MANSFIELD, C. J. Cases like this must have very often occurred, and yet it does not appear that the right of distress has ever before been called in question. The difficulty of the case consists in this, that in London and other towns it scarcely ever happens that any house is let without some goods being let with it, and yet one rent is always reserved. In the case of a brewhouse it is common to let the

utensils with it, and yet I never heard it doubted that the landlord might distrain for rent. Whether the goods be worth five shillings or five hundred pounds, the case must be the same. We will inquire into the matter, and give our opinion in a few days. *Cur. adv. vult.*

On this day SIR JAMES MANSFIELD, C. J., said: Upon this question no authorities have been cited either on the one side or the other. But it must occur constantly that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods; for rent cannot issue out of goods. In *Spencer's Case*, 5 Co. 17, it is resolved that if a man lease sheep or other stock of cattle, or any other personal goods, for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee; for it is but a personal contract; and it is added "the same law, if a man demises a house and land for years with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant, for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only." The material words in that resolution are those which declare that where land is leased with stock upon it, the rent still continues to issue out of the land only. In that case, therefore, as well as any other, the person to whom the rent is due may distrain for the same; and consequently the landlord here, who was not paid his rent, has pursued his legal remedy of distress, though the rent issued out of ready furnished lodgings. *Rule discharged.*

WEBB v. JIGGS.

KING'S BENCH. 1815.

[*Reported 4 M. & S. 113.*]

DEBT. The plaintiff declares that one J. Webb was seised in fee of certain lands at Iver, in Buckinghamshire, and being so seised, by his will, duly executed according to the Statute, gave and bequeathed to the plaintiff an annuity or yearly rent of £10 to be issuing and payable yearly and every year during the life of the defendant Martha out of the said lands, and also gave and bequeathed the said lands to the said Martha and her assigns for her life, she paying thereout in manner aforesaid to the plaintiff the said annuity or yearly rent, and afterwards the said J. Webb died, and his will was duly proved, whereupon the

said Martha became seised as of freehold for her life of the said lands, and the plaintiff became entitled to the said annuity or yearly rent, and afterwards the said Martha married the other defendant Jiggs, whereby they became seised of the lands as of freehold in right of the said Martha for her life, and so the plaintiff avers that while they were so seised, and were the perners of the profits thereof, £75 of the said annuity or yearly rent, for seven years and a half, ending on the 25th of March 1814, became due from the defendants as the perners, and still is in arrear and unpaid, whereby *actio accrevit, &c.*

Demurrer. Joinder.

Richardson, in support of the demurrer.

Gifford, contra.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J., on this day delivered the judgment of the court. After stating the pleadings, His Lordship said: This demurrer was argued at our sittings before Hilary Term in Serjeants' Inn Hall, when it was contended on the part of the defendants, in support of the demurrer, that at the common law an action of debt will not lie for a rent or annuity in fee, in tail, or for life, while it continues a freehold interest. And this position was not denied on the other side, but it was contended that it applied only to legal common law estates, and not to devises by will; and what appears to have been said by Holt, C. J., in *Ever v. Jones*, reported in 2 Ld. Ray. 937, Salk. 415, and 6 Mod. 26, 27, was relied on; viz., "That a devisee may maintain an action at common law against the terre-tenant for a legacy devised payable out of land. For where a Statute, as the Statute of Wills, 32 & 34 H. 8, gives a man a right, he shall have an action to recover it of consequence; because his right is created by Act of Parliament." But what Lord Holt is there stated to have said does not reach this objection; it is said only generally of a legacy or sum of money, not of an annuity or rent for life, in tail, or in fee; and it is to be observed, that in the case of a legacy payable out of land, unless the legatee had his remedy by action of debt, founded on the Statute, he would be wholly without remedy in the courts of common law; whereas the annuitant would not be remediless, but would have an assise to recover his annuity. And no authority has been stated where the general rule of law, which excludes the action of debt as a remedy for rent or annuity in fee, in tail, or for life, has been confined to annuities or rents created by common law conveyances, as contradistinguished from annuity or rents created by devise, nor does there seem any reason for making the distinction. It was next contended on behalf of the plaintiff, that this case was within the provisions of the 4th section of Stat. 8 Ann. c. 14, "for the better security of rents, and to prevent frauds by tenants;" but the language both of the title of the Act, and of the enacting clause, shows that the Legislature contemplated only the case of rent due from a tenant, holding by lease or demise under his landlord, — which is not this case; this being the case of two distinct and independent devises, of the land to one person for life, and to another of an annuity issuing

out of the same for the life of the devisee of the land, created by the will of one and the same deviser, and without any such original privacy between the devisee of the land charged with the annuity, and the devisee of the annuity charged thereupon, as subsists between a lessor and his lessee. We are therefore of opinion that the action of debt is not maintainable on the ground of this Stat. of Ann. c. 14, any more than it is upon the other ground already considered.

MILNES v. BRANCH.

KING'S BENCH. 1816.

[*Reported 5 M. & S. 411.*]

COVENANT. The plaintiffs declare, that, by indenture of the 20th of June, 1805, between one Joshua Barnsley, of the first part, one J. Robinson, a trustee for J. Barnsley, of the second, the defendant of the third, and one J. Jackson, a trustee for the defendant, of the fourth (reciting indentures of lease and release, whereby a plot of land was conveyed to one P. Hope, and the said J. Barnsley, their heirs and assigns, as to one undivided moiety, to the use of such person and persons, and for such estate, &c., as P. Hope should, by deed in writing, duly executed, &c., limit or appoint, and, in default of such appointment, after the decease of P. Hope, to the use of the right heirs of P. Hope forever; and as to the other undivided moiety, to the like use, with respect to J. Barnsley; subject to the yearly rent of £42, payable to the lessors; and reciting also other indentures of lease and release, whereby the said P. Hope limited and appointed to J. Barnsley and J. Robinson, and the heirs and assigns of J. Barnsley, his undivided moiety in the plot of land, and also in four messuages, then lately built thereon, in trust, as to the estate of J. Robinson, for J. Barnsley, his heirs and assigns forever, subject to the rent covenants, &c., reserved and contained in the former release; and further reciting that the defendant had contracted with J. Barnsley for the purchase of the plot of land and messuages, subject to the yearly chief rent of £86 3s. 8d.), the said J. Barnsley, by virtue of the said power, limited and appointed one undivided moiety in the plot of land and messuages, to remain to the defendant and J. Jackson, their heirs and assigns forever; and for the further assuring the same, and to convey and assure the other undivided moiety, and in consideration of the yearly rent and covenants, &c., on the part of the defendant, his heirs, executors, administrators, and assigns, to be paid and performed, and also of 5s. paid by the defendant to J. Robinson, J. Barnsley, and J. Robinson (according to their several estates) the said J. Barnsley did grant, bargain, sell, alien, enfeoff, and confirm to the defendant and J. Jackson, and the heirs and

assigns of the defendant, all that plot of land, &c., and six messuages built thereon, &c., and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, &c., of them the said J. Barnsley and J. Robinson, *habendum* to the defendant and J. Jackson, their heirs and assigns, to the use, intent, and purpose, that J. Barnsley and J. Robinson, their heirs and assigns, might have, receive, and take, to the use and behoof of J. Barnsley and J. Robinson, and the heirs and assigns of J. Barnsley (nevertheless, as to the estate of J. Robinson, in trust only for J. Barnsley, his heirs and assigns forever), the clear yearly rent of £86 3s. 3d. to be issuing out of the premises, by equal half-yearly payments on the 24th of June and 25th of December, with power of distress and entry for recovery thereof, to J. Barnsley and J. Robinson, and subject to the above rent, and powers for recovery thereof, to the use of the defendant and J. Jackson, and the heirs and assigns of the defendant, forever (nevertheless as to the estate of J. Jackson, in trust only for the defendant, and his heirs and assigns), and the defendant did for himself, his heirs, executors, and administrators, covenant with J. Barnsley and J. Robinson, and the heirs and assigns of J. Barnsley, that he, his heirs or assigns, would pay to J. Barnsley and J. Robinson, and the heirs and assigns of J. Barnsley forever, the said yearly rent, and also, that he, his heirs and assigns, would, within one year next ensuing the date of the indenture, erect, build, and finish, in a good and substantial manner, and forever support and maintain, upon the plot of land, one or more messuages or other buildings, of good brick or stone, or both, set in good lime mortar, and covered with slates, which at the time of finishing, and at all times thereafter, should, together with the messuages conveyed, be of the clear yearly value of double the yearly rent thereby reserved, at the least, over and above all reprises, and, in case of fire, tempest, destruction, or decay, should rebuild the same, so that at all times, forever, the buildings then erected and to be erected, should continue of the clear yearly value of double the yearly rent thereby reserved at the least, for the better security of the yearly rent thereby reserved; and J. Barnsley and J. Robinson constituted their attorney, to deliver seisin to the defendant and J. Jackson, according to the indenture, which was accordingly done *And J. Barnsley and J. Robinson being so seised of the rent aforesaid, within one year next ensuing the date of the said indenture, viz., on the 24th of June, 1805, by indenture of that date, demised to the plaintiffs, their executors, administrators, and assigns, the said rent of £86 3s. 3d., and all their interest in the same for 1000 years. And the plaintiffs assign for breach a year's rent in arrear on the 24th of June, 1814, and also that the defendant or his assigns, did not, within one year next ensuing the date of the first-mentioned indenture, nor at any other time, erect, build, or finish, in a good and substantial manner, or otherwise howsoever, upon the plot of land or any part thereof, one or more messuages, &c., which at the time of finishing was or were, or at any times thereafter*

hath or have been with the other messuages conveyed of the clear yearly value of double the yearly rent at the least, &c.

The defendant prayed oyer of the indenture, and demurred to the declaration. Joinder.

Richardson, in support of the demurrer.

Littledale, contra.

LORD ELLENBOROUGH, C. J. I am inclined to think that the language of Lord Holt, as to the right of the assignee of the rent to have covenant, was extra judicial; and putting aside that *dictum*, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shown that this is land; it might as well be applied to any covenant respecting a matter merely personal. The Stat. H. 8 recites that, at common law, such only as are parties or privies to any covenant can take advantage of it: here is neither privity of contract nor privity of estate; the rent is reserved out of the original estate.

BAYLEY, J. I am entirely of the same opinion. The argument for the plaintiffs loses sight of the conveyance by which this rent is created. It is incorrect to state it as a rent charge granted by the owner of the fee; it being a conveyance in fee by Barnsley and Robinson to the defendant to certain uses, one of which is that they shall receive the rent; so that the rent arises out of the estate of the feoffors. It is therefore not a grant by the owner of the fee, and the covenant is a covenant in gross.

ABBOTT, J., concurred.

HOLROYD, J., having been of counsel in the case, declined giving any judgment.

*Judgment for the defendant.*¹

PARMENTER v. WEBBER.

COMMON PLEAS. 1818.

[*Reported 8 Taunt. 593.*]

REPLEVIN for taking the plaintiff's goods and cattle. Avowries: First, for a year's rent due to the defendant from the plaintiff at Lady-day, 1816. Second, for £42 10s., the amount of half a year's rent due on that day. Plea in bar to both, *non tenuit*; and issue thereon. At the trial before Wood, B., at the last Essex Assizes, a verdict was taken for the defendant on the second avowry for £42 10s., the value of the goods distrained, subject to the opinion of the court upon a case of which the following is the substance.

The defendant being in the occupation of two farms, of one as lessee

¹ The benefit of a covenant to pay a fee-farm rent has often been allowed to run in the United States. *Scott v. Lunt*, 7 Pet. 596 (1833); *Streater v. Fisher*, 1 Rawle, 155 (1829); *Van Rensselaer v. Read*, 26 N. Y. 558 (1863); *Tyler v. Heidorn*, 46 Barb. 439 (1866). But see *Van Rensselaer v. Platner*, 2 Johns. Cas. 24.

See cases under Covenants running with the Land, *ante*, pp. 439 *et seqq.*

to Lord Petre, and of the other as lessee to the Rev. M. Boskell, on the 20th September, 1814, an agreement in writing, dated on that day and stamped with a £2 stamp, was entered into between the plaintiff and the defendant, by which "the plaintiff was to have the two farms during the leases of the same, the plaintiff to remain tenant to the defendant during the leases." The agreement then stated the rents, rates, and taxes, and provided, that should the property tax be taken off, it should be taken off from the plaintiff, he agreeing to pay to the defendant £200 for the fallows, dung, and improvements. The defendant was to pay all rates, rents, and taxes up to Michaelmas, 1814, and the plaintiff agreed to farm according to the tenor of the leases, and for every default, to pay according to the forfeiture of the leases. The rent was to be paid half-yearly, at Lady-day and Michaelmas. The plaintiff was to take possession on or before Michaelmas-day then next, or to forfeit £50; and if the defendant refused to comply, he was to forfeit £50. At the leaving of the farms, the plaintiff was to be paid for the fallows and dung. The plaintiff paid the £200 mentioned in the agreement: possession of the farms was given to him by the defendant at Michaelmas, 1814; and one year's rent afterwards growing due, had been paid by the plaintiff to the defendant. It was contended at the trial, that the agreement operated as an absolute assignment by the defendant to the plaintiff of all the defendant's interest in the farms; and that, therefore, the defendant, having no reversion left in him, could not legally distrain.

The question for the opinion of the court was, whether the plaintiff was entitled to recover. If the court should be of that opinion, then a verdict was to be entered for him, with nominal damages; if not, the verdict for the defendant was to stand.

Best, Serjt., for the defendant.

Blosset, contra.

DALLAS, C. J. I am of opinion that the instrument in question amounts to an absolute assignment of the defendant's interest in the two farms; and that, therefore, this distress cannot be supported. In the case in *Wilson* [— v. *Cooper*, 2 Wills. 375], the defendant avowed under a distress for rent due from the plaintiff to him upon an assignment of a lease of a term for years to the plaintiff; and the question was, Whether that was a rent for which a distress would lie? Though there was a rent reserved upon that instrument, the court held that the assignor, having granted all his estate in the term, could not distrain; and in giving their judgment, referred to Brooke's Abridgment, tit. Dette, pl. 39, where the Year Book, 43 Edw. 3, 4, is cited for the following proposition: "If a man hath a term for years, and grants all his estate of the term, rendering certain rent, he cannot distrain if the rent be in arrear." I am of opinion that the plaintiff is entitled to judgment.

PARK and BURROUGH, JJ., of the same opinion.

*Judgment for the plaintiff.*¹

¹ See *Preece v. Corrie*, 5 Bing. 24; *The King v. Wilson*, 5 M. & RyL. 140, 157-162 *note*.

FAREWELL v. DICKENSON.

KING's BENCH. 1827.

[Reported 6 B. & C. 251.]

THIS was an action of debt for rent, tried before *Bayley, J.*, at the last sittings in this term for Westminster. The declaration alleged a demise of "a messuage land and premisses with the appurtenances." The plaintiff, for the purpose of proving the amount of rent due, put in evidence an agreement dated the 20th of September, 1825, between J. M. Farewell, the late husband of the plaintiff, and the defendant, which described the property demised as being "a messuage or tenement, stable, and outbuildings, with the cottage, garden land, and appurtenances belonging thereto, *together with the furniture, utensils, and implements.*" The learned judge considering the agreement as an entire contract for the rent of the house, &c., with the furniture, &c., held the variance fatal, and nonsuited the plaintiff, but gave him leave to apply to the court to set aside the nonsuit, and enter a verdict for £120. A rule *nisi* for that purpose was obtained by *Rowe*, who relied on *Spencer's Case*, 5 Co. 17; *Emott v. Cole*, Cro. Eliz. 255; *Newman v. Anderton*, 2 New Rep. 224; *Walsh v. Pemberton*, Selw. N. P. 6th edit. 616, to show that no portion of the rent issued out of the furniture, but that the whole issued out of the land, and therefore the demise was well laid as a demise of the house, &c.

Chitty showed cause on the last day of the term.

Rowe was stopped by the court.

PER CURIAM. It appeared that the furniture was one of the things demised. But in point of law the rent issued out of the real property, and not out of the furniture. It was sufficient, therefore, for the plaintiff to allege and prove a demise of the real property out of which the rent claimed issued, and the rule for entering a verdict for the plaintiff must be made absolute.

*Rule absolute.*¹

BUSZARD v. CAPEL.

KING's BENCH. 1828.

[Reported 8 B. & C. 141.]

TROVER for two barges; first count on the possession of the bankrupt, second count on the possession of the assignees. Plea, Not guilty. At the trial before *Lord Tenterden*, C. J., at the London Sittings after

¹ But see *Newton v. Wilson*, 3 Hen. & Munf. 470; *Mickle v. Miles*, 31 Pa. 20; *Vetter's Appeal*, 99 Pa. 52.

Trinity Term, 1827, the jury found a verdict of Not guilty on the first count; and on the second a special verdict, stating, as to the grievances in that count mentioned, that, at the time of making the distress thereafter mentioned, W. R. Jones and G. Jones had become bankrupts, and the plaintiffs had been chosen and appointed their assignees; that the plaintiffs, as such assignees, before and at the time of the making of the distress thereafter mentioned, were lawfully possessed, as of their property as such assignees, of the barges thereafter mentioned to have been taken and distrained by the defendants; and that by an indenture dated the 9th of March, 1816, and made before W. R. Jones and G. Jones, or either of them, became bankrupts, between one T. Brown of the one part, and the bankrupts of the other part, Brown demised, leased, &c. to the bankrupts all that wharf, ground, and premises next the River Thames, and also all that capital brick built warehouse of three floors erected and built thereon, abutting north on the River Thames, east on premises in the occupation of T. Flockton, south on the street cartway and common highway leading from Pickle Herring Stairs to Horsley Down Stairs, and west on the Five Footway or Little Wharf for landing goods, and certain other premises in the indenture more particularly mentioned, together with free liberty for them the bankrupts, their executors, &c. during that demise, to land and load goods, &c. in common with the rest of the tenants of Brown, at the said Five Footway or Little Wharf fronting the River Thames, together with all cellars, ways, paths, passages, lights, easements, profits, commodities, and appurtenances whatsoever to the said wharf, ground, warehouse, and premises, or any of them, belonging or appertaining; *habendum*, the same premises, with their and every of their appurtenances, unto the bankrupts, their executors, &c., from the 23d March then past for the term of thirteen years, at the yearly rent of £555, by equal quarterly payments, payable to Brown, and after his death to the person who should be entitled to the freehold of the premises. The special verdict then stated, that by the indenture the exclusive use of the land of the River Thames opposite to and in front of the said wharf ground between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the said wharf ground and premises, but that the land itself between high and low water mark was not demised; that on the 12th of November, 1826, the sum of £565 of the rent was in arrear and unpaid; and that on that day, and at the time of making the distress thereafter mentioned, the two barges, the property of the plaintiffs as such assignees, were attached by ropes head and stern to the wharf ground aforesaid, and were lying and being on that part of the River Thames opposite to and in front of the said wharf ground and premises, and between high and low water mark, the exclusive use of which was demised as aforesaid; that the defendants on the said 12th November as the bailiffs of the person who was then entitled to the freehold of the wharf and premises, and was duly authorized by law to distrain for the

arrears, seized and took the two barges as a distress for the arrears of rent, and shortly afterwards sold and disposed thereof to satisfy such arrears. This case was argued on a former day in this term by *Richards*, for the plaintiff.

Starr, contra.

Cur. adv. vult.

LORD TENTERDEN, C. J. It is difficult to understand what is really meant by that part of the finding of the jury, "that the exclusive use of the land of the River Thames opposite to and in front of the said wharf ground between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the said wharf ground and premises; but that the land itself between high and low water mark was not demised." And it is difficult to understand how the exclusive use could be demised and the land not; but in either case the distress cannot be supported. If the meaning of this finding be that the land itself was demised as appurtenant to the wharf, that would be a finding that one piece of land was appurtenant to another, which, in point of law, cannot be. If, on the other hand, the meaning be that the use and enjoyment of this land passed as appurtenant, that would be a mere privilege or easement, and the rent would not issue out of that; the landlord, therefore, could not distrain there for rent issuing out of the land in respect of which the easement or privilege had its existence. That is understood to be the law of the land, and an Act of Parliament was passed to remedy this inconvenience as far as rights of common were concerned. Taking the finding of the jury in either sense, the defendant had no right to distrain on the premises in question, and the judgment of the court must be for the plaintiffs.

Judgment for the plaintiffs.

PRESCOTT v. BOUCHER.

KING'S BENCH. 1832.

[*Reported 3 B. & Ad. 849.*]

REFLEVIN. Avowry by the defendant as executor of the last will and testament of William Boucher, deceased, stated that the plaintiff from the 25th of March, 1829, until and after the 25th of March, 1830, and from thence until and at the time of the death of the said W. Boucher, held and enjoyed the premises mentioned in the declaration, &c., as tenant to W. Boucher by virtue of a demise thereof to him the defendant theretofore made at the yearly rent of £70, and because £70 of the rent for the space of one year ending on the 26th of March, 1830, was due, and unpaid until and at the time of the death of W. Boucher, and from thence until and at the said time when, &c., continued in arrear from the plaintiff to the defendant, as such executor, he the defendant

as such executor avowed, &c. Plea in bar by the plaintiff, that the said W. Boucher at the time of the making of the said demise in the avowry mentioned, and from thence until and at the time of his death, was seised in his demesne as of fee of and in the said premises, in which, &c., and that the said demise under which the plaintiff held and enjoyed the same, &c., at the yearly rent in the avowry mentioned, was a certain demise thereof, heretofore, to wit on the 25th of March, 1825, made by the said W. Boucher, in his lifetime to the plaintiff for a term of years still unexpired, to wit, the term of seven years. General demurrer and joinder. This case was argued in last Easter Term.¹

Follett, in support of the demurrer.

Crowder, contra.

Our. adv. vult.

LORD TENTERDEN, C. J., in the course of this [Trinity] term delivered the judgment of the court.

The question raised upon this record is this, Whether the executor of a person who was seised in fee of land and demised it for a term of years, reserving a rent, can distrain for the arrears of such rent, accrued in the lifetime of the testator? At common law it is clear that he could not so distrain, and his power to do so, if he has any, must be derived from the provisions of the Statute 32 H. 8, c. 37, § 1.

The preamble of that Statute is material because the enacting part of the first section has no words distinctly describing the persons whose executors are empowered to distrain; but refers to the preamble by the word "such."

The preamble and first section of the Act are as follows: "Forasmuch as by the order of the common law, the executors, or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of lives, of rents services, rent charges, rents secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms, as were due unto the testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain, or have any lawful action to levy any such arrearages of rents or fee farms, due unto him in his life as is aforesaid; by reason whereof, the tenants of the demesne of such lands, tenements or hereditaments, out of the which such rents were due and payable, who of right ought to pay their rents and farms at such days and terms as they were due, do many times keep, hold, and retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee farms were due, cannot have or come by the said arrearages of the same, towards the payment of the debts and performance of the will of the said testators: for remedy whereof be it enacted, &c., that the executors and administrators of every *such person or persons*, unto whom any such rent or fee farm is or shall be due, and not paid at the time of his death, shall and may have an action of debt for all such arrearages, against the tenant or tenants that ought to

¹ Before LORD TENTERDEN, C. J., LITLEDAL, PARKER, and PATTERSON, JJ.

have paid the said rent or fee farms so being behind in the life of their testator, or against the executors and administrators of the said tenants ; and also furthermore, it shall be lawful to every such executor and administrator of any such person or persons unto whom such rent or fee farm is or shall be due, and not paid at the time of his death as is aforesaid, to distrain for the arrearages of all such rents and fee farms, upon the lands, tenements, and other hereditaments, which were charged with the payment of such rents or fee farms, and chargeable to the distress of the said testator, so long as the said lands, tenements, or hereditaments continue, remain and be in the seisin, or possession of the said tenant in demesne who ought immediately to have paid the said rent or fee farm so being behind, to the said testator in his life, or in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form as their said testator might or ought to have done in his lifetime, and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid."

Looking at these words independently of decided cases, it should seem that the Legislature meant to provide remedy for those only who were previously without any remedy, by action or otherwise ; and the Statute provides a double remedy, namely, by action of debt, and by distress. What persons had a remedy by action of debt, and the reasons why they had it, will be found laid down in Bacon's Abridgment, tit. Rent (K) 6, referring to Gilbert on Rents, 93, Co. Lit. 162, and *Oguel's Case*, 4 Co. 49. The passage is as follows : " The remedy by action of debt extended only to rents reserved on leases for years, but did not affect freehold rents ; the reason whereof is this : Actions of debt were given for rent reserved upon leases for years, for that such terms being of short continuance, it was necessary that the lessor should follow the chattels of his tenant, wherever they were, or wheresoever he should remove them : but when the rents were reserved on the durable estate of the feud, the feud itself, and the chattels thereupon were pledged for the rent ; and if the land were unstocked for two years, the lord had his *cessavit per biennium* to recover the land itself ; and hence it is that if the durable estate of the feud determined, as if the lessee for life died, the lessor might have an action of debt for the arrears : because the land was no longer a security for the rent, and therefore the chattels of the tenant were liable to satisfy the arrears in an action of debt wherever the tenant removed them. So it was in the case of a rent charge ; for if a man were seised of it in fee, and it was arrear, he could have no action of debt for the arrears ; and if he died, his heir could not have any real action for the arrears, for that is proper for the recovery of the possession, which was still in him, nor could he have a personal action, because, besides the former reason, it were absurd to give a real action for the rent running on in his own time, and a personal action for the arrears in the lifetime of the ancestor at the same

time; for it could not be supposed to be both a real and personal thing; for this reason also, the executor could have no action for the arrears, (who is entitled to the personal estate), and also because he could not entitle himself by virtue of the contract that created the rent, since the heir was constituted representative by the contract, and by consequence that representation excluded all other persons from taking any benefit as representatives that did not come under that character."

The view of the Statute which has been above suggested, was acted upon in the case of *Turner v. Lee*, Cro. Car. 471, in which it was held, that where a rent charge had been granted for years, if the grantee should so long live, the executor of the grantee could not distrain under the Statute, because he had a remedy by action of debt at the common law. If this construction had always been adhered to, the present case would be clear; but a different view of the Statute seems to have been taken in a previous case of *Lambert v. Austin*, Cro. Eliz. 332, in which it was assumed that the executor of the grantee for his own life of a rent charge could distrain under this Statute, although it is plain that such executor had a remedy by action of debt at common law, the estate for life in the rent having been determined. And in *Hool v. Bell*, 1 Ld. Raym. 172, the point was expressly so held. It was there argued that the expression "tenants for life" in the Statute must be taken to mean tenants *pour autre vie*, whose executors were certainly without remedy during the life of *cestui que vie*; but the court said: "The Statute is a remedial law, and shall extend to the executors of all tenants for life, and the law has been taken so always since the Statute, and has never been questioned, and the words of the Statute are general enough to extend to all. And in *Lambert v. Austin* this seems to be admitted, and therefore the rule in *Turner v. Lee*, so generally taken, cannot be law." The case of *Hool v. Bell* appears to have been always treated as good law, and it must be considered that the Statute 32 H. 8, c. 37, is not confined to persons who had no remedy at all previously.

The question then is whether the present case be within the words or meaning of the Statute. The words are "executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of lives, of rents services, rent charges, rents secks and fee farms." Nothing is said as to tenants for term of years. If therefore the testator in the present case was tenant for term of years, his executor is not within the words of the Statute. If the testator was tenant of the *rent* at all, it seems difficult to say that he was tenant for a longer time or for a greater estate, than the rent could have continuance; it seems absurd to say that a man is seised in fee of a rent, the duration of which is limited to a few years, or to a particular life. In the case of a rent charge granted for years, it is impossible to say that the grantee is within the words "tenant in fee simple, fee tail, or for term of lives," and why should a lessor who reserves a rent to himself and his heirs, by a lease for years, be thought to be within the same words? The reasons which are pressed in argument are that the rent is incident to the

reversion, that the lessor is seised in fee of the reversion, and must therefore be seised in fee of the rent which is incident to it; and that he cannot be tenant for years of the rent, for if he were, it would go to his executors on his death, whereas, by law, it is incident to the reversion and passes with it. This argument may be very forcible to show that the lessor who has demised for years, is not tenant for years of the rent; but it does not follow that he is tenant in fee simple, fee tail, or for term of lives, of the same rent. It is true that in the present case the testator was seised in fee of the land before he made a lease for years; after making that lease, he continued seised in fee of the land, seised of the immediate freehold, but, in respect to the right of possession, having a reversionary estate expectant on the determination of the lease for years: he still continues tenant of the freehold in every legal sense, and is not tenant of the *rent* at all in the legal sense of the word "*tenant*," as used in the Statute in question.

Where indeed the rent is reserved on a lease for life, or a gift in tail, the lessor or donor parts with the immediate freehold in the land; he has only a reversionary estate expectant on the determination of the immediate estate of freehold which is in another; and during that estate of freehold, he is strictly tenant of the rent in a legal sense, though it be a rent service and be incident to the reversion: his remedy for the rent is by writ of assize, and not by a personal action of debt. If the lease be for life, he is tenant for life of the rent; if it be a gift in tail, he is seised of the rent during the continuance of the estate tail. It is true that since the Statute *Quia Emptores*, no one can reserve a rent service on a conveyance in fee; but the Statute 32 H. 8, c. 37, may allude by the words "tenants in fee simple of a rent service," to rent services created before the Statute *Quia Emptores*, of which there are still many which are called quit rents. Or the words of the Statute may be taken *reddendo singula singulis*, and applying the words "tenants in fee simple, tenants in fee tail," to rent charges and fee farms.

For these reasons we are of opinion that a person seised in fee of land and demising it for years, reserving a rent, though he be not tenant for years of the rent, is still not within the words of this Statute "tenant in fee simple, fee tail, or for term of lives," of the rent, and is indeed not tenant at all of the rent.

It remains to be considered whether he is within the meaning of the Statute.

It is matter of history that at the time when this Statute passed, leases for years were but little regarded. It is clear also that an action of debt for rent on such leases was maintainable. Such leases therefore do not appear to have been within the mischief intended to be remedied by the Statute, nor probably within the contemplation of the framers of the Act, and Lord Coke in his observations on this Statute, Co. Lit. 162 b, makes no allusion to leases for years, and evidently considers the Statute as applicable only to freehold rents.

Some authorities upon this subject remain to be noticed. The first is

the case of *Turner v. Lee*, already cited, which arose on a lease for years determinable on a life, and the Statute was held not to apply. The point does not appear to have been raised in any reported case from that time till the case of *Renvin v. Wutkin*, Mich. T. 5 Geo. 2, B. R., which is to be found in the first vol. of Selwyn's *Nisi Prius*, p. 678 of the 8th edition. It is as follows: "A. seised in fee let to the plaintiff for twenty-one years, and afterwards died seised of the reversion: the defendant administered, and distrained for half a year's rent due to the intestate, for which he avowed. On demurrer to the avowry it was objected that there was not any privity of estate between the administrator and the lessor, and therefore the avowry, which is in the realty, could not be maintained by him. And it was observed that this was a case out of the Statute 32 H. 8, c. 37, for that only gives a remedy by way of distress for rents of freehold, and of this opinion the court seemed. 1 Inst. 162 a, 4 Rep. 50, Cro. Car. 471, Latch. 211. (*Wade v. Marsh*), were cited." There is a note as follows:—

"But in *Powell v. Killick*, Middlesex Sittings, M. 25 G. 2, where in trespass for entering plaintiff's house and carrying away his goods, upon not guilty, defendant gave in evidence that he was executor of A. who was plaintiff's landlord of the house and that he distrained for rent due to his testator at the time of his death; it was objected for plaintiff that executor was empowered to distrain only by virtue of the Statute 32 H. 8, c. 37, and that the Statute extended to the executors and administrators of those persons only to whom rent services, rent charges, rents seck, or fee farms were due, and that the present case did not fall within either of those descriptions. But Lee, C. J., overruled the objection, and said this was a rent service, the testator being in his lifetime seised in fee, and the plaintiff holding under a tenure which implied fealty." It is to be observed that this was a *nisi prius* decision, and the point argued seems to have been only whether the rent was a rent service, which it clearly was. The point now raised does not seem to have been discussed, and it should also be observed, that Mr. Justice Buller in his *Nisi Prius*, p. 57, cites the case and apparently disapproves of it. His words are: "Lord Coke says, if a man make a lease for life, or a gift in tail, reserving a rent, this is a rent service within the Statute: from whence it may be inferred that he thought a rent reserved upon a lease for years was not within it: and I apprehend that it is not, for the landlord is not tenant in fee, fee tail, or for life, of such a rent; and it is the executors of such tenants only who are mentioned in the Act. However, in trespass, where it appeared that the defendant had distrained the plaintiff's goods for rent due to his testator upon a lease for years, Lord C. J. Lee held it to be within the Statute, and the defendant obtained a verdict."

The next case was *Meriton v. Gilbee*, 8 Taunt. 159, where the point was attempted to be raised; but the court said, that it did not appear whether the tenancy was for term of years or for life. Then came the case of *Martin v. Burton*, 1 Brod. & B. 279, which was decided on the

ground that it did not appear that the testator was not seised in fee, in tail, or for life. Afterwards the case of *Staniford v. Sinclair*, 2 Bing. 193, was decided on the same ground, though the court in giving judgment examine into some of the cases, and into the point now raised, which was not necessary to the determination of the case.

Upon the whole, therefore, and for the reasons stated, we are of opinion that this case is neither within the words nor the meaning of the Statute 32 H. 8, c. 37, § 1, and that the judgment of the court must be for the plaintiff.

Judgment for the plaintiff.

GIBSON v. KIRK.

QUEEN'S BENCH. 1841.

[Reported 1 Q. B. 850.]

DEBT for use and occupation of a messuage &c. by the sufferance and permission of plaintiff; and on an account stated. The particulars stated the action to be brought for the sum of £26 for one year's rent due to the plaintiff on 11th December, 1838, for the use and occupation of a dwelling house &c.

Plea. As to all but £13, parcel &c., *nunquam indebitatus*; as to the £13, a tender. The plaintiff took the £13 out of court, and joined issue on the plea of *nunquam indebitatus*.

On the trial, before *Alderson*, B., at the Spring Assizes for Newcastle, 1839, it appeared that the premises had been let by the plaintiff to the defendant by a written demise, not under seal, reserving a rent of £26 *per annum* payable half-yearly. The defendant's counsel contended that the plaintiff must be nonsuited, for that debt for use and occupation did not lie where there was an actual demise. The learned judge overruled the objection; and the plaintiff had a verdict. In Easter Term, 1839, *R. Matthews* obtained a rule for a new trial on the ground of misdirection. In last Hilary Term¹

Alexander and *W. H. Watson*, showed cause.

R. Matthews, contra.

Cur. adv. vult.

LORD DENMAN, C. J., delivered the judgment of the court.

This was an action of debt for use and occupation. Plea, *Nunquam indebitatus*. On the trial it appeared that the defendant held under a lease, not under seal, dated Oct. 8, 1837, whereby the plaintiff agreed to let, and the defendant to take, the premises at £26 *per annum*: the tenancy to commence on the 11th November then next. The learned judge was asked to nonsuit, but refused, and directed a verdict for the plaintiff.

We are now asked to set this verdict aside, upon the ground that the action is misconceived; that, although a count in debt for *rent* would

¹ Before LORD DENMAN, C. J., and LITLEDALE, PATTESON, and CULERIDGE, JJ.

be good under the circumstances, yet that a count in debt for *use and occupation* is not good, as soon as it appears that there is a demise at a certain rent.

The objection is one of a strictly technical nature; but the defendant is not on that account less at liberty to take it: and, if it be found tenable, the plaintiff is in no way aggrieved; for he might have framed his count without any difficulty, so as to be free from all objection.

The action of debt for use and occupation (as well as that of *indebitatus assumpsit* for the same) is quite of modern introduction. The learned counsel for the defendant conceded, upon the argument, that such action would lie at common law where there is no demise at a certain rent; and probably, upon principle, it would lie; but no instance of it is to be found in any of the old entries. The first notice of such an action is in *Stroud v. Rogers*, 6 T. R. 63, note (a), Hil. 32 G. 3, cited and relied on in *Wilkins v. Wingate*, 6 T. R. 62, and again in *King v. Fraser*, 6 East, 348. Since those cases, the action has become very common, and has certainly been resorted to wherever the demise has not been by deed, without regard to the distinction now taken between mere occupation by permission for reasonable remuneration, and demises for a certain time at a certain rent. Actions of *indebitatus assumpsit* for use and occupation have also been constantly brought, whether there has been a certain term and a certain rent or not; but that action is protected, by Stat. 11 G. 2, c. 19, § 14, from being defeated by proof of a certain rent under a parol demise or agreement not under seal, whereas the action of *debt* is not mentioned in that Statute, but only an action on the *case*; and, in *Egler v. Marsden*, 5 Taunt. 25, Gibbs, J., expressly states that the action of *debt* for use and occupation is not under Stat. 11 G. 2, c. 19, § 14.

Before that Statute, actions of *assumpsit* for the occupation of land had frequently been held maintainable, notwithstanding the objection that rent sounded in the realty, and could not be the subject of a mere personal action, the courts apparently treating the contracts between the parties as agreements and not leases, and so not concerning the realty, wherever they held the actions maintainable, and holding the action not maintainable wherever they could not shut their eyes to an actual lease, as in the case of *Brett v. Read*, 1 (W.) Jones, 329; s. c. Cro. Car. 343, which was *indebitatus assumpsit* for *rent arrear*, and was held bad on that account. The principal cases are collected in the note to *Beverley v. The Lincoln Gas Light and Coke Company*, 6 A. & E. 839, note (a). The court in that case observed that the action for use and occupation is *established* by Stat. 11 G. 2, c. 19, § 14; which expression must not be taken as meaning that it was *introduced* by that Act, but only that it was *established* even in cases where there was an express demise at a certain rent if not under seal. Yet no instances of *indebitatus assumpsit* for use and occupation will be found before that Act, nor any founded upon a *quantum meruit*: they are all for some fixed sum.

So *debt for rent* was at all times maintainable, whether the demise was by deed, or by writing not under seal, or by word of mouth, both which latter are of course included in the expression "parol demise," so frequently found in our books. The entries are numerous in Rastall, and Clift, and Thompson, and in Saunders, and other books. But they one and all contain the word "demised," and show the rent in certain: though, where the demise was by deed, no *profert* is made, and frequently no statement of the existence of a deed, it being considered as mere inducement to the action. No instance is to be found among them of an action of debt for a *reasonable* remuneration for the occupation of land.

The truth is, that the occupation of land by a person bound to pay some remuneration for it, without the amount or time of payment being fixed, was, and is now, of rare occurrence. When it does occur, the implied contract is raised by law from the fact that land belonging to the plaintiff has been occupied by the defendant by the plaintiff's permission; the obligation is coextensive with, and measured by, the enjoyment: as soon as the occupation ceases, the implied contract ceases; and, as no express time is limited, the remuneration must necessarily accrue from day to day. This state of things is *prima facie* supposed to exist in all actions for use and occupation, at least so far as regards time of payment; therefore it is held that in debt for use and occupation it is not necessary to state the particulars of the holding.

Wilkins v. Wingate, 6 T. R. 62; *King v. Fraser*, 6 East, 348; *Davies v. Edwards*, 3 M. & S. 380. And, in such action for the use and occupation of a house which has been burned down, the plaintiff may recover up to the time of the fire, as was held by this court in Easter Term last, in the case of *Packer v. Gibbins*, 1 Q. B. 421; in which case the defendant could only have prevented the plaintiff from so recovering by setting up that he was tenant for a certain time; and then he would have been liable for rent *after* the fire until that time had elapsed. The action of debt for use and occupation was wanted only where the occupation was for no certain time at no fixed rent; for in all other cases the action of debt for *rent* was the known and appropriate remedy. Yet it does not appear to have been introduced to meet such cases; for in *Stroud v. Rogers* (note *b* to *Wilkins v. Wingate*) and *Wilkins v. Wingate*, there was a demise for a certain time at a certain rent. It is true that both those cases arose on demurrer to the count for use and occupation, in which no such demise was stated; but in both of them there were counts for rent: and it is pretty clear that, if the defendants had pleaded *nil debet*, the same point would have arisen as is raised in the present case. *King v. Fraser*, and *Davies v. Edwards*, were also on demurrer. But upon the argument of the former it was assumed throughout that there was a demise which might have been stated with particularity; and the court in their judgment do not put the case at all upon the ground that possibly there was no demise for a time certain at a certain rent, and so the count might be

free from all the objections urged. On the contrary, Lord Ellenborough says: "As to the inconveniences to the tenant, which are pointed out by the causes of demurrer alleged, they may be gotten rid of, by calling for particulars of the plaintiff's demand: or if another action for rent be brought, he may by proper averments in his plea show that the plaintiff had before recovered the same rent in an action for use and occupation, of the same premises." What is this but saying, in direct terms, that debt for use and occupation will lie, where debt for *rent* will also lie?

Egler v. Marsden, which was eight years later than *King v. Fraser*, was after verdict on *nil debet*; and objection was taken that debt for use and occupation in that general form would not lie; and the objection was overruled; but it was not suggested that there was no demise and, therefore, an action for use and occupation was the only remedy, which would have been a ready answer, if the facts had been so.

Since that, the very recent case of *Wilkinson v. Hall*, 3 New Ca. 508, has been determined; in which, after a trial where a written agreement amounting to a lease not under seal was given in evidence, the court directed the verdict to be entered on the third count, which was in debt for use and occupation in the general form. It is true that the objection now raised was not taken: the case therefore goes no further than showing the prevailing notion that *debt* for use and occupation will lie, notwithstanding the existence of a written lease not under seal.

But it is asked, What is the difference between the actions of debt for use and occupation, and of *indebitatus assumpsit* for the same; and if the latter, but for the operation of the Stat. 11 G. 2, c. 19, § 14, would be defeated by proof of a written demise, although not under seal, why should not the former, to which the Statute does not apply, be defeated by similar proof?

One answer may be, that the action of *assumpsit* was always looked upon, not only as a personal action, which the action of debt equally is, but as one wholly inapplicable to realty or matters arising out of it, as rent is: whereas the action of debt was always applicable to rent and some other matters connected with realty. The action of debt was always treated as of a higher nature than *assumpsit*; it will lie on records and specialties, where *assumpsit* will not: and, though it be true that, wherever *indebitatus assumpsit* will lie, debt will lie (with the exception of the present action, if it be one), the converse is not true. It may therefore be proper to apply different rules to an action of debt, even upon simple contract, from those which are applicable to *indebitatus assumpsit*.

But another answer is, that, although the Statute 11 G. 2, c. 19, § 14, recites that some difficulties many times occur in the recovery of rents where the demises are not by deed, and makes provision only for an action on the case, protecting the plaintiff from being nonsuited in *such* action if "any parol demise or any agreement (not being by deed)

whereon a certain rent was reserved shall appear," it by no means follows that, previous to that Statute, a nonsuit must have taken place under similar circumstances in an action of debt for use and occupation. No instances of such actions before the Statute are recorded; but, soon as they were brought after the Statute, they received the construction which has already been noticed, and which they might have received, if brought before the Statute, without violating any rules of law.

The objection is, as was at first stated, purely a technical and formal one; and, when the courts once established that debt for use and occupation would lie, no sound reason can be assigned why it should not be applied to all cases of demises not under seal, as it undoubtedly has been for a long series of years.

For these reasons we are of opinion that the direction of the learned judge in this case was correct, and that the rule for a new trial must be discharged.

Rule discharged.

WILLIAMS v. HAYWARD.

QUEEN'S BENCH. 1859.

[Reported 1 F. & E. 1040.]

THE declaration set out a deed, dated 10th November, 1846, by which John Williams demised, leased, and to farm let to the defendant, his executors, administrators, and assigns, in consideration of the rents, royalties, and payments thereafter reserved, and of the covenants thereafter contained, certain mines, veins, and seams of ironstone and iron ore, coal, and other mines and minerals, with power to the defendant, his executors, &c., to enter into the said lands and premises, and work the said mines, &c., and to have, take, and carry away all such ironstone, iron ore, &c., together with full liberty, license, and authority to the defendant, his executors, &c., from time to time, during the continuance of the demise, to use, jointly with the said J. Williams, his heirs, executors, administrators, lessees, tenants, and assigns, the railroad then laid down and extending from the said works to the port of Port Madoc, subject to certain covenants, provisos, and conditions thereafter contained: to have, hold, exercise, and enjoy the said mines, &c., and the said powers, privileges, and liberties, and all other the premises thereby granted or demised, unto the defendant, his executors, administrators, and assigns, for the term of twenty-three years; yielding and paying unto the said J. Williams, his heirs, executors, administrators, and assigns, a certain royalty for every ton of ironstone or iron ore; or if, in any year, the said royalties should not amount to £100, then a sum of £100 in lieu thereof; and also a certain royalty on the coal and other minerals: the defendant covenanting to work the mines, &c., properly; and a power being reserved to J. Williams, his

executors, &c., to distrain for any of the said rents and reservations if the defendant should make default in payment of them. The deed also contained a covenant by the defendant to repair all roads, ways, railways, and particularly the railway aforesaid; provided that if any other persons during the said term should use and occupy the said railway for any other purpose, the defendant should not be liable to bear, jointly with such other persons, more than a fair proportion of the expense of repair. There was a further proviso that it should be lawful for the defendant to divert the said railway at his own expense. The declaration then stated the execution of the deed and a counterpart by J. Williams and the defendant respectively; and that, afterwards, J. Williams, by deed, dated 4th November, 1846, assigned and set over to the plaintiff the said rents, reservations, and royalties, and all other the estate, right, title, interest, benefit, claim, and demand of him, J. Williams, of, in, or in respect of the said demised premises; and the benefit of the said covenants in the said lease contained. And although the said several royalties did not, nor did they in any one year, amount to the sum of £100 as aforesaid, and although all things existed and duly happened before suit to entitle the plaintiff to payment of the said reserved rent of £100 *per annum*, accruing due after the said assignment, in lieu of the said royalties, according to the terms of the said first-mentioned deed, and on 25th March, 1857, there became and was due and payable to the plaintiff, under and by virtue of the said deeds, in respect thereof, the sum of £1000, for and in respect of the aforesaid rent of £100 for ten years of the said term respectively expiring after the said assignment, and before suit; yet no part thereof had been paid, contrary to the said covenant of the defendant.

Third plea. That the said J. Williams, at the time of making the said alleged demise, was possessed only of a term and interest in the said demised premises less than that purporting to be granted by the said demise, to wit, of a term therein, theretofore granted to him by one Martin Williams, of thirty years, to be computed from 4th March, 1839; and at no time after the making of the said alleged demise had any reversion expectant on the determination of the said term to the plaintiff.

Demurrer. Joinder in demurrer.

Fifth plea. That, after the said alleged assignment to the plaintiff in the declaration mentioned, and before any part of the said rent in the declaration mentioned became due and payable, the plaintiff forcibly entered into and upon part of the said demised premises, and then ejected and expelled the defendant from the possession of part of the said demised premises, that is to say, from the said railroad, and the use thereof, and the said liberty, license, and authority to use the same so respectively demised as aforesaid, and kept and continued the defendant so ejected and expelled from thence hitherto.

Demurrer. Joinder in demurrer.

Second replication to the third plea. That, admitting that the said

J. Williams, at the time of the making of the alleged demise, was possessed only of the term and interest therein mentioned, yet that the rent claimed in and by the declaration in this action accrued due to the plaintiff before the expiration of that term, which is still unexpired: and that the plaintiff, before and at the time of the accrual of any part of the rent claimed in this action, had, under and by virtue of the alleged assignment, become assignee of the said rent and every part thereof, and entitled to sue as aforesaid for the same.

Demurrer. Joinder in demurrer.

Raymond, for the plaintiff.

T. Jones, for the defendant.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court.¹

In this case the declaration stated that one John Williams had, by deed, demised certain mines and minerals, with power of getting the same, and with a right to use a certain railway, to the defendant for twenty-three years, at a rent; that the defendant sealed and executed the lease; that the said John Williams had subsequently, by deed, assigned and set over to the plaintiff the rents, reservations, and royalties, and all other the estate, right, title, interest, benefit, claim, and demand of the said John Williams of, in, or in respect of the said demised premises; and that ten years' rent was in arrear to the plaintiff. The defendant pleaded (*inter alia*) two pleas, on which questions arose which were argued before us.

One of these pleas, the third on the record, stated that the lessor's interest was a leasehold interest only, and for a shorter period than the time granted by the lease; and the fifth plea on the record stated an expulsion from the use of the railway.

The first and principal question was that raised by the first of these pleas. It appeared from the pleadings that the original lessor, being possessed of a chattel interest (a term of years), demised for a longer term, reserving a rent, and then assigned his interest and the rent. It was contended by Mr. Jones, on behalf of the defendant, that no rent was created; and that, if there was, it was not such as was assignable, so as to give the assignee a right to bring an action of debt for the rent against the lessee.

We think that the authorities are conclusive on both questions.

The case of *Newcomb v. Harvey*, Carth. 161, shows clearly that by such an instrument as the present a rent is created. The question in that case was, whether a lessee for years, who had assigned over the whole of his term to the defendant, rendering rent, could declare for the rent in an action of debt on the demise, or should have brought covenant for the sum as a sum in gross; and it was expressly "resolved *per curiam* that this is a rent, though the plaintiff had no reversion; for if a rent is reserved upon a feoffment in fee, there is no reversion in the feoffor." *Newcomb v. Harvey* is referred to by Lord Chief Baron

¹ LORD CAMPBELL, C. J., ERLE, CROMPTON, and HILL, JJ.

Comyns in Com. Dig. Dett (C), as an authority for the position that, "if lessee for years assigns all his term to B., rendering rent, debt lies by the lessee for the rent, as such, for it is not a sum in gross; though no reversion remains in the lessee." These authorities are fully recognized by the Court of Common Pleas in *Baker v. Gostling*, 1 New Ca. 19, 27; and Lord Chief Justice Tindal assigns as a reason for holding that, where the whole of a term is assigned, a sum of money reserved periodically to the assignor is to be treated as rent, that, "if it were held otherwise, great injustice might be occasioned, as the tenant, if evicted, would have no answer to an action on his covenant for the payment of the sum" reserved.

The next point which arose upon the argument was whether the action could be maintained by the plaintiff, who was assignee of the party to whom the rent was reserved. *Robins v. Cox*, 1 Lev. 22, and *Allen v. Bryan*, 5 B. & C. 512, were relied on by Mr. Raymond as authorities directly in favor of the plaintiff on this question. But it was contended on the other side that *Allen v. Bryan* was not argued, and that counsel for the defendant in that case gave it up upon the notion that it was governed by *Robins v. Cox*, whereas it was distinguishable therefrom, as in the case in *Allen v. Bryan* there was no attornment, and the judgment in *Robins v. Cox* proceeded on the ground that, the tenant having attorned, the privity of contract was transferred: and it was further contended that Stat. 4 Ann. c. 16, § 9, did not apply, but was limited to assignments of reversions. We are of opinion that the defendant is not well founded in his objection to the authority of *Robins v. Cox* and *Allen v. Bryan* as applicable to the present case. In the former case the plaintiff declared that A. was seised of land, and leased it to the defendant for years, rendering £80 yearly rent, and afterwards granted the rent to the plaintiff, to which grant the defendant attorned: and for £80, a year's rent, the action was brought. After verdict for the plaintiff it was moved that the action lay not, for default of privity; for it was contended that the privity of estate remained with the lessor, and no privity of contract passed to the grantee of the rent. But to this it was answered that the attornment of the tenant made a privity, for his attornment is a consent to the grant. Upon argument the judges were divided in opinion, and the case was adjourned into the Exchequer Chamber. The reporter adds: "But after this, the third part of Sir George Croke's Reports were published, and there, folio 687, 651, *Ard and Watkins's Case*, it was adjudged, that the devisee of a rent reserved on a lease for years, as here, might maintain debt for the rent. Whereupon the parties before any argument in the Exchequer Chamber agreed." In our opinion Stat. 4 Ann. c. 16, § 9, renders attornment unnecessary in such a case as the present; and, by force of that Statute, the same privity is created between the plaintiff, as grantee of the rent, and the defendant, the tenant of the land out of which the rent issues, as if the defendant had actually attorned to the plaintiff. Attornment is stated by Lord Coke to be "an agreement of the tenant to

the grant of the seignory or of a rent, or of the donee in tail, or tenant for life or years, to a grant of a reversion or remainder made to another." Co. Lit. 309 a. Stat. 4 Ann. c. 16, § 9, appears to have been intended to meet both parts of this definition. It enacts that "all grants or conveyances" "of any manors or rents, or of reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants," "as if their attornment had been had and made." The Statute, therefore, in terms, creates the same privity, between the grantee of the rent and the tenant of the lands out of which it issues, as an attornment would have done if the tenant had actually attorned to the grantee. The defendant's counsel in *Allen v. Bryan* was, therefore, well justified in supposing that case to be governed by *Robins v. Cox*. To these it may be added that in *Marle v. Flake*, 3 Salk. 118, it is stated to have been adjudged "that where the lessor assigned his rent without the reversion, the assignee (if the tenant agrees) may maintain an action of debt for the rent, because the privity of contract is transferred." There is also the case of *Clarke v. Coughlan*, 3 Irish Law Rep. 427, which is an authority on all fours with the present case. That was a case of an assignment of the whole interest at a rent: and the very learned persons who decided that case, after a full investigation of the authorities, came to the conclusion that the action was maintainable under circumstances which were not attempted to be distinguished from those in the case now before us. We are satisfied, therefore, upon the authorities, that the plaintiff is entitled to our judgment on the question arising on the third plea.

We think also that no defence is shown on the fifth plea. The rent issued out of the things demised, that is, the mines and minerals; and could not have issued out of the easement to use the railway in common with others on the land, not parcel of the demise; and we think that the preventing the defendant from using, or obstructing him in the enjoyment of, the easement is not such an eviction from the thing demised or any part of it, as will amount to an answer to the claim of rent. Our judgment on both the demurrers is for the plaintiff.

Judgment for the plaintiff.

THOMAS v. SYLVESTER.

QUEEN'S BENCH. 1873.

[Reported L. R. 8 Q. B. 368.]

DECLARATION: That the plaintiff, being seised in fee of certain messuages and hereditaments situate, &c., by indenture bearing date the 15th of January, 1870, made by and between the plaintiff of the one part, and one David Cotter of the other part, granted and conveyed the messuages and hereditaments (subject to and charged and chargeable

with the payment forever to the plaintiff, his heirs and assigns, of a certain yearly rent-charge of £2 8s. 6d. payable out of each of the said messuages and hereditaments on the 24th of June and the 21st of December in each year), unto and to the use of Cotter, his heirs and assigns; and Cotter in the indenture covenanted for himself, his heirs, executors, and administrators, that he, his heirs, executors, administrators, or assigns, would pay unto the plaintiff, his heirs or assigns, the yearly rent-charge on the days aforesaid. That afterwards all the estate of Cotter in the premises became vested in the defendants; and while the estate was so vested in the defendants, to wit, on the 24th of June, 1871, the rent-charge accrued due and became due and was payable from the defendants to the plaintiff; yet the defendants did not pay the same, and the same remains wholly due and unpaid.

Demurrer and joinder in demurrer.

H. T. Cole, Q. C., in support of the demurrer.

C. Bowen, contra.

BLACKBURN, J. I think the only question which it is necessary to decide is, whether the plaintiff, the grantee of the rent-charge, is entitled to compel the terre-tenants to pay it by a personal action. I may remark that the indenture may be regarded as containing a grant in fee of a rent-charge under the Statute of Uses, and that a rent having been duly created, debt will lie. Under the old law the remedy to recover a freehold rent was by real action, and as long as the freehold continued, debt could not be maintained; but when the freehold estate came to an end, then, inasmuch as a real action could no longer be brought, debt would lie at the suit of the person entitled to the rent-charge. Thus, where a rent was granted for life the only remedy was by real action, but when the life had dropped, debt was maintainable. *Leving's Case*, cited in a note to Fitzherbert, *Natura Brevium*, p. 121, is a distinct authority that where a rent-charge for life had been created, issuing out of a manor which was afterwards conveyed to an assignee, and the rent-charge became in arrear, an action of debt would lie against the assignee of the manor upon the expiration of the life estate, when, according to the old law, a real action could no longer be brought to recover the arrears. *Leving's Case* is important, as showing that the action of debt is maintainable against an assignee, and it is precisely in point in the present case, where the plaintiff seeks to recover the rent-charge against the assignees of the land. If the present case had occurred before the passing of 3 & 4 Wm. 4, c. 27, the rent-charge being in fee, the plaintiff would have been driven to a real action to recover it. But the Legislature having by that Act abolished real actions, we have to consider the question, whether we must not apply the principle of the common law to the present case. The principle was, that, when the estate for life had terminated, an action of debt for arrearages would lie. It seems to me to follow, upon a similar principle, that when the real action has been abolished, the grantee of a rent-charge in fee may maintain an action of debt against the terre-

tenant; and this was the opinion of Pollock, C. B., in *Varley v. Leigh*, 2 Ex. 446; 17 L. J. Ex. 289, though that opinion was not necessary to the decision, and Rolfe, B., did not concur. The authorities brought before us, however, were not cited. I think that, real actions being now abolished, debt will lie; and that the authorities show that it will lie against the assignee of the land as well as against the original grantor.

This is not a question of a covenant running with the land, but whether, where there is a rent in fee issuing out of land, the owner of the rent may not sue the terre-tenant in debt, although the terre-tenant was not the original grantor. It seems to me that, according to authority, reason, and justice, he may maintain the action.

QUAIN, J. I am of the same opinion. The distinction in the old books appears to be this: If a rent were granted for years, debt would lie, but if it were granted in tail, or for life, debt would not lie for arrears until after the freehold had determined; but when the freehold had determined, then debt would lie, and the reason assigned was that the freehold remedy must be pursued, because the law did not suffer a real injury to be remedied by an action merely personal. Putting aside the remedy by real action, would debt have lain against an assignee who is in possession of the same estate in the land as the grantor of the rent? That appears to be decided in *Sir W. Loringe's Case*, cited in *Oguel's Case*, 4 Co. Rep. at f. 49 b, thus: "A man was grantee for life of a rent out of a moiety of a manor, of which moiety a man was seised in right of his wife; the rent was in arrear when the grantee died, and the executors brought an action of debt against the husband only for the arrears. It was resolved: 1. That by the death of the grantee for life, the grant for life was turned into nature of debt. 2. Forasmuch as the husband took the profits of the land charged with the rent when it was arrear, he only, without his wife, should be charged with an action of debt." The action was against the person who is called the pernor of the land, provided he had the same estate as the grantor. I apprehend that the reason is that the land is the debtor, as is stated by Wilson, J., in *Mills v. Auriol*, 1 H. Bl. at p. 445. If a man comes into possession of land as tenant in fee, he is the pernor of the profits of the land, and was liable to a real action for the non-payment of a rent-charge created by a former tenant in fee; if this be so, since real actions are abolished, an action of debt will lie.

I agree it is not necessary to go into the question whether the covenant runs with the land.

ARCHIBALD, J. I also agree in thinking there is no necessity to consider the question in what cases covenants run with the land. It seems to me to be a question of remedy. When we enter into the reasons why debt would not lie for the recovery of the arrears of a freehold rent-charge, it is clear that there was no oversight in abolishing real actions without providing for cases of this kind. The reason why debt did not lie was that the law did not suffer the right injured to be amended by

an action merely personal. It is clear from *Leving's Case* that where no real action could be brought, debt would lie; and inasmuch as the abolishing of real actions has removed that remedy, I quite agree with my Brothers Blackburn and Quain that in the present case the action of debt is maintainable, and therefore our judgment must be for the plaintiff.

Judgment for the plaintiff.

SECTION II.

APPORTIONMENT, SUSPENSION, AND EXTINGUISHMENT.

LIT. § 222. Also, if a man hath a rent charge to him and to his heirs issuing out of certain land, if he purchase any parcel of this to him and to his heirs, all the rent charge is extinct, and the annuity also; because the rent charge cannot by such manner be apportioned. But if a man, which hath a rent service, purchase parcel of the land out of which the rent is issuing, this shall not extinguish all, but for the parcel. For a rent service in such case may be apportioned according to the value of the land. But if one holdeth his land of his lord by the service to render to his lord yearly at such a feast a horse, a golden spear, or a clove, gilliflower, and such like; if in this case the lord purchase parcel of the land, such service is taken away; because such service cannot be severed nor apportioned.

Co. LIT. 147 b. The reason of this extinguishment is, because the rent is entire, and against common right, and issuing out of every part of the land, and therefore by purchase of part it is extinct in the whole, and cannot be apportioned. But by act in law it may, as hereafter shall be said.¹

¹ "A rent is an incorporeal hereditament, and susceptible of the same limitations as other hereditaments. Hence it may be granted, or devised, for life, or in tail, with remainders or limitations over. But there is this difference between an entail of lands and an entail of rent: that the tenant in tail of lands, with the immediate reversion in fee in the donor, may, by a common recovery, bar the entail and the reversion; whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquires, by a common recovery, only a base fee, determinable upon his decease, and failure of the issues in tail; but if there is a limitation of it in fee, after the limitation in tail, the recovery of the tenant in tail gives him the fee simple. This was resolved in the cases of *Smith v. Farnaby*, Carter, 52; Sid. 285, and 2 Keb. 29, 55, 84; *Weekes v. Peach*, 2 Lutw. 1218, 1224; and *Chaplin v. Chaplin*, 3 P. Wms. 229. The reason of this difference is, that it would be unjust that the conveyance of a grantee of a rent should give a longer duration or existence to the rent, than it had in its original creation. It is true, that the harring of an estate tail in land is equally contrary to the intention of the grantor. But a rent differs materially from land. The old principles of the feudal law looked upon every modification of landed property, which was considered to be against common right, with a very jealous eye. Now, a rent-charge was supposed to be against common right, the grantee of the rent-charge being subject to

Co. Lit. 148 a. But yet a rent charge by the act of the party may in some case be apportioned. As if a man hath a rent charge of twenty shillings, he may release to the tenant of the land ten shillings or more or less, and reserve part; for the grantee dealeth only with that which is his own, viz., the rent, and dealeth not with the land, as in case of purchase of part. And so was it holden in the Common Place, Hil. 14 Eliz., which I myself heard and observed. So if the grantee of an annuity or rent charge of twenty pound grant ten pound parcel of the same annuity or rent charge, and the tenant attorn, hereby the annuity or rent charge is divided.

Id. So likewise if the lessor granteth part of the reversion to a stranger, the rent shall be apportioned; for the rent is incident to the reversion. So it is if tenant by knight's service by his last will and testament in writing deviseth the reversion of two parts of the lands, the devisee shall have two parts of the rent.

Co. Lit. 148 b. This is intended of a fee simple, for if there be a lord and tenant of forty acres of land by fealty and twenty shillings rent, if the tenant maketh a gift in tail, or a lease for life or years, of parcel thereof to the lord, in this case the rent shall not be apportioned for any part, but the rent shall be suspended for the whole: for a rent service (saith Littleton) may be extinct for part, and apportioned for

no feudal services, and being a burden upon the tenant who was to perform them. Upon this principle the law, in every instance, avoided giving by implication a continuation to the rent, beyond the period expressly fixed for its continuance. Thus if a tenant in tail of land die without issue, his wife is entitled to dower for her life out of the land, notwithstanding the failure of the issue; but the widow of a tenant in tail of rent is not entitled to her dower against the donor. So if a rent is granted to a man and his heirs generally, and he dies without an heir, the rent does not escheat, but sinks into the land. It is upon this principle that when there is not a limitation over in fee, a tenant in tail of rent acquires, by his recovery, no more than a base fee. But if there is a limitation in fee, after the particular limitation in tail, the grantor has substantially limited the rent in fee; and therefore, it is doing him no injustice that the recovery should give the donee, who suffers it, an estate in fee simple. The case of *Chaplin v. Chaplin* was, that Lady Hanby, the grandmother of Porter Chaplin, being seised in fee, conveyed divers lands, to the use and intent that the trustees named in the deed, should receive and enjoy a rent-charge of £30 *per annum* to them and their heirs, with power to distrain for it, and to enter and hold the land on non-payment for forty days; and then the rent was declared to be to the use of Porter Chaplin in tail: remainder to the use of the same person who had the land in fee. It is stated to have been afterwards disclosed to the court, that the legal estate of the rent in fee was in the trustees. But it is worthy of the attention of the reader, that it was not necessary that any new matter should be adduced to disclose this to the court, as it appears on the face of the deed; for a conveyance to A. and his heirs, to the use and intent that B. and his heirs may receive a rent out of the estate, gives B. the legal fee of the rent; so that if it is afterwards declared, that B. and his heirs are to stand seised of the rent to uses, the intended *cestuis que use* take only trust or equitable estates. If, therefore, it is intended to limit a rent in strict settlement, it is necessary to do it by way of grant at common law, to some person and his heirs, to the uses intended to be limited. This gives the grantee the mere seisin to the uses, and the uses declared upon it will be executed by the Statute. See note on uses 271, b. VII. 3." — Butler's note to Co. Lit. 298 a.

the rest; but a rent service cannot be suspended in part by the act of the party, and in *esse* for other part. So it is if the lessor enter upon the lessee for life or years into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned for any part. And where our books speak of an apportionment in case where the lessor enters upon the lessee in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part.

LIT. § 224. Also, if a man hath a rent charge, and his father purchase parcel of the tenements charged in fee, and dieth, and this parcel descends to his son who hath the rent charge, now this charge shall be apportioned according to the value of the land, as is aforesaid of rent service; because such portion of the land purchased by the father cometh not to the son by his own fact, but by descent and by course of law.

THRE'R v. BARTON.

1570.

[*Reported Moore, 94 pl. 282.*]

A MAN made a lease for a hundred years, and the lessee made a lease for twenty years, rendering rent, with a clause of re-entry; and afterwards the first lessor granted the reversion in fee, and attornment was had accordingly. The grantee purchases the reversion of the term; he will have neither the rent nor the re-entry, for the reversion of the term, to which it was incident, is extinct in the reversion in fee. And this was adjudged at the Assizes between Lord Thre'r and Barton who was lessee, as *Stephens* relates. And *Plowden* and others agreed to it; but *Popham* took this diversity: If a man makes a lease for life, rendering rent, and the lessee for life makes a lease for years rendering rent, and afterwards the lessee for life surrenders to him in the reversion in fee, he will not have the rent of the lessee for years, nor an action of waste, because the tenant for life who surrendered could not punish the waste in this case. So if the tenant purchases the reversion in fee, he will not have an action of waste during his own life. But otherwise is it if a man makes a lease for years rendering rent, and afterwards grants the reversion for life, or for years, and he in reversion surrenders to him, he will have the rent or waste, because it was once a rent incident to the reversion, and so it was not in the other. But *Plowden* and *Ipsley* said that all is one as to the action of waste.

CIBEL AND HILL'S CASE.

COMMON PLEAS. 1588.

[Reported 1 Leon. 110.]

A LEASE was made of a certain house and land rendering rent, and another sum, *Nomine pœnæ*; and for the *Nomine pœnæ* the lessor brought an action of debt. The lessee pleaded, that the lessor had entered into parcel of the land demised, upon which they were at issue, and found for the plaintiff; and now the lessor brought debt for the rent reserved upon the same lease; to which the defendant pleaded, *ut supra, scil.* an entry into parcel of the land demised: And issue was joined upon it; And one of the jury was challenged, and withdrawn, because he was one of the former jury: And the issue now was, whether the said Cibell, the lessor, *expulit et amovit et adhuc extra tenet*, the said Hills. And to prove the same, it was given in evidence on the defendant's part, that upon the land demised there was a brick-kiln, and thereupon a little small cottage, and that the lessor entered, and went to the said cottage and took some of the bricks and untiled the said cottage: But of the other side it was said, that the lessor had reserved to himself the bricks and tiles aforesaid, which in truth were there ready made at the time of the lease made, and that he did not untile the brick-kiln house, but that it fell by tempest, and so the plaintiff did nothing but came upon the land to carry away his own goods: And also he had used the said bricks and tiles upon the reparation of the house. And as to the *extra tenet*, which is parcel of the issue, the lessor did not continue upon the land, but went off it, and relinquished the possession: But as to this last point, it seemed to the court, that it is not material if the plaintiff continued his possession there or not, for if he once doth anything which amounts to an entry, although that he depart presently, yet the possession is in him sufficient to suspend the rent, and he shall be said, *extra tenere* the defendant the lessee, until he hath done an act which doth amount to a re-entry. And afterwards to prove a re-entry, it was given in evidence on the plaintiff's part, that the defendant put in his cattle in the field where the brick-kiln was, and that the cattle did stray into the place where the defendant had supposed that the plaintiff had entered. And by ANDERSON, Justice, the same is not any re-entry to revive the rent, because they were not put into the same place by the lessee himself, but went there of their own accord. And such also was the opinion of Justice PERIAM.

CARREL v. READ.

QUEEN'S BENCH. 1595.

[Reported Cro. El. 374.]

COVENANT. Lessee for years covenants to drain such water out of land before such a day. He pleads, that before the day the lessor entered, and continued in possession until after the day: and it was thereupon demurred. — Adjudged to be no plea, because it is a collateral act to be done by him; unless he had said, that the lessor held him out, and disturbed him to do it.

CLUN v. FISHER.

KING'S BENCH. 1612.

[Reported Cro. Jac. 309.]

DEBT for fifty pounds rent reserved upon a lease for years. The case upon demurrer was, That Anne Breedon, tenant for life, made a lease for fifty years, if she lived so long, rendering annually during the term two hundred pounds quarterly, at Michaelmas, Christmas, the Annunciation, and Midsummer, by equal portions, or within thirteen weeks after every of the said feasts. She dies after Michaelmas, and within the thirteen weeks, and for the rent due at Michaelmas before her death this action was brought; and all this matter being disclosed in the count, the defendant demurred in law.

The sole question was, Whether this rent were due, she dying after Michaelmas, and before the end of the said thirteen weeks?

It was argued by *Hedley* for the defendant, and *Yelverton* for the plaintiff; and, after argument at the bar,

FLEMING, Chief Justice, and WILLIAMS delivered their opinion, that this rent was not due; for the reservation being in the disjunctive at the four feasts, or within the thirteen weeks after every of the said feasts, nothing is due until the end of the thirteen weeks, but there is only an election given to the lessee to pay it at the feasts, if he will, but until the end of the thirteen weeks he cannot demand it by distress or action of debt, and therefore is not any duty; and if the ancestor make such a lease, and die after Michaelmas, before the end of the thirteen weeks, this rent shall go to the heir, and not to the executor: and if the lessor release all actions and demands after Michaelmas, before the end of six months, this rent is not released; but peradventure by a particular release, with precise words, it may be released: and if the lessee make a forfeiture, and the lessor enter therefore in the interim, betwixt Michaelmas and the end of the thirteen weeks, no rent is due to the lessor. And there is a difference betwixt this case and the case of *Barwick v. Foster*, Cro. Jac. 233, where a lease made for twenty-

one years rendering annually at Michaelmas, or within forty days, such rent, the lease beginning at Michaelmas shall end there; and the rent was due for the last year, although the year expired before the forty days; for the reservation being annually during the term, at the said feasts, or within forty days, it shall be expounded according to their contract at the end of every forty days during the term: but the term ending at Michaelmas, so as there cannot be forty days after during the term, the law rejects that forty days at the last feast; for that cannot be, and then it is due at the feast, according to the contract of the parties: but here the term being uncertain, depending upon the life of the lessor, the law respects the thirteen weeks as the feasts; and as if she die before the feasts, it is not due; so if she die after the feasts, and before the thirteen weeks end, it is not due by the contract: and if there be an eviction by elder title betwixt Michaelmas and the thirteen weeks, there is not any rent due; for the reservation is at such days during the term.

CROKE, Justice, to the contrary; for the rent is reserved payable annually, and is a duty at the said feast, otherwise it is not annually reserved, nor payable: and the addition, "or within thirteen weeks," is but an enlargement of the day of payment, for the case of the lessee at his election: and he denied the law to be so in the cases put of the death of the ancestor after Michaelmas, where the eviction is after Michaelmas; for he held, that the rent is due to the executor, and not to the heir, and is due notwithstanding the eviction after Michaelmas; for otherwise the intent of the parties to have an annual reservation is destroyed, if the rent be not due until a year and a quarter after. *Et adjournatur.*

NOTE. — Afterwards it was adjudged for the defendant. See Dyer, 142, and the case of *Smith v. Bustard*.¹

DORREL v. ANDREWS.

1616.

[Reported Hob. 190.]

ACTION of debt was brought by Mrs. Dorrel against Andrews, a knight, upon a lease made by her to him in trust for Trussel, for seventy-five pounds, a quarter's rent, and declared of a demise *de toto illo messuagio capitali maner. et domo mansionali, cognit. per nomen de Causton infra parochiam de Dunchurch, ac omnia horrea ter. tenementa, &c., scituat. in Causton*. The defendant pleads an entry and expulsion out of the garden house, and well, though parcel of the tenements, &c.: whereupon issue; and the venue was *de Causton. infra parochiam de Dunchurch*, and the plaintiff had judgment, notwithstanding exception taken to the venue.

¹ See *Marshall v. Moseley*, 21 N. Y. 280.

PARADINE v. JANE.

KING'S BENCH. 1647.

[Reported *Aleyn*, 26.]

IN debt the plaintiff declares upon a lease for years rendering rent at the four usual feasts; and for rent behind for three years, ending at the Feast of the Annunciation, 21 Car., brings his action: The defendant pleads, that a certain German prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, hath invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession from the 19 of July, 18 Car., till the Feast of the Annunciation, 21 Car., whereby he could not take the profits; whereupon the plaintiff demurred, and the plea was resolved insufficient.

1. Because the defendant hath not answered to one quarter's rent.

2. He hath not averred that the army were all aliens, which shall not be intended, and then he hath his remedy against them; and Bacon cited 33 H. 6, 1 e, where the jailer in bar of an escape pleaded, that alien enemies broke the prison, &c., and exception taken to it, for that he ought to show of what country they were, viz. Scots, &c.

3. It was resolved, That the matter of the plea was insufficient; for though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. Dyer, 33 a; Inst. 53 d, 283 a; 12 H. 4, 6. So of an escape. Co. 4, 84 b; 33 H. 6, 1. So in 9 E. 3, 16, a *supersedeas* was awarded to the justices, that they should not proceed in a *cessavit* upon a cesser during the war, but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he ought to repair it. Dyer, 33 a; 40 E. 3, 6 h. Now the rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations. This reservation then being a covenant in law, and whereupon an action of covenant hath been maintained (as Roll said), it is all one as if there had been an actual covenant. Another reason was added, that as the

lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burden of them upon his lessor; and Dyer 56, 6, was cited for this purpose, that though the land be surrounded or gained by the sea, or made barren by wild-fire, yet the lessor shall have his whole rent: And judgment was given for the plaintiff.

ROPER v. LLOYD.

KING'S BENCH. 1678.

[Reported T. Jones, 148.]

IN covenant on articles of agreement, the breach was assigned for non-payment of rent reserved in a lease for years of a messuage, &c., by the plaintiff to the defendant, which rent the defendant covenanted to pay. The defendant pleaded that, after the articles, the plaintiff had separated, pulled down, taken and carried away a penthouse, fixed and annexed to the said messuage, and part of the premises demised, and detained it before the rent became due, *et adhuc detinet*; judgment whether the action lay. On this the plaintiff demurred, and judgment was given for him, for this was no suspension of the rent, but a trespass for which the defendant may have his action.¹

COLBORNE v. WRIGHT.

KING'S BENCH. 1679.

[Reported 2 Lev. 289.]

DEBT for arrears of rent as executor, and also as administrator *durante minore aetate* of his co-executor, and declares, that the testator made the plaintiff and others his executors, and that J. D. seised of a rent of £20 *per annum*, devised it to three persons in equal parts in common, and that all the three devisees levied a fine of one moiety thereof to the wife of the testator in fee, and of the other moiety to the use of a stranger in fee, and that the stranger granted his moiety to the wife of the testator in fee, that the testator had issue by her, and after the wife died, whereby the testator became seised of the whole by curtesy of England, and that the rent grew due to the testator, who made him and the other co-executors, and that he solely proved the will, and administration was granted to him during the minority of the co-executor, who is still under age. To this declaration the defendant demurred, and two things were now insisted on for the defendant: 1.

¹ *Hunt v. Cope*, Cowp. 242, accord. See *Bennet v. Bittle*, 4 Rawle, 339.

That this being a rent-charge which is against common right, it cannot be divided only to make tertenant subject to several distresses without his consent, and there is no attornment, Co. Lit. 148 a; *aliter* of a rent-service or such things as are of common right, Hob. 25. Grantee of a rent gives part thereof by fine, the tenant is not bound to attorn, therefore the devise and the fine to uses thus divided is not good. He agreed, that to a devise or a fine to uses there needs no attornment; but the devise or fine in such case of things not dividable, can't be divided, but the devise and the fine itself are void. 2. Both the executors ought to join in the action, though only one of them prove the will, and an executor and administrator to the same person are inconsistent; for where there is an executor, the ordinary hath no power to grant administration. 9 Co., *Hensloe's Case*; Yelv. 130, *Smith v. Smith*; and *Cunningham's Case*, lately adjudged in this court. To which it was answered by the counsel of the plaintiff, and resolved by the COURT: 1. That by these conveyances of devise and fine to uses, the rent may be divided without the assent or attornment of the party, because his assent or attornment is not necessary to the perfection of these conveyances. 2. Where one of the executors is an infant, and cannot prove the will, administration *durante sua minoritate* may be granted to the other, who must sue solely, and it is not inconsistent to have administration in such case, for it is not granted in this case, as it is upon a dying intestate; for here the will is proved but only to enable him to sue solely, because the other is not capable of proving the will, nor to join with him, and he cannot sue solely; and cited *Hatton and Mascall's Case*, entered in this court, Mich. 15 Car. 2, B. R. Rot. 703, the roll whereof was brought into court, and appeared to be so adjudged. But where both executors are of full age, though the will be proved by one only, the action must be brought in both their names.

So judgment was given for the plaintiff.

Holt, junior, for the plaintiff.

Levinz, for the defendant.¹

ST. 11 GEO. II., c. 19, § 15. And whereas where any lessor or landlord, having only an estate for life in the lands, tenements, or hereditaments demised, happens to die before or on the day, on which any rent is reserved, or made payable, such rent, or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life; of which advantage hath been often taken by the under-tenants, who thereby avoid paying any thing for the same; for remedy whereof, be it enacted by the authority

¹ See *West v. Lassels*, Cro. El. 851; *Collins and Harding's Case*, 13 Co. 57; *Ards v. Walkin*, Cro. El. 637, 651, *ante*, p. 667; *Rivis v. Watson*, 5 M. & W. 255; *Ryerson v. Quackenbush*, 2 Dutch. 236.

aforesaid, That from and after the twenty fourth day of June, one thousand seven hundred and thirty eight, where any tenant for life shall happen to die before or on the day, on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, that the executors or administrators of such tenant for life shall and may in an action on the case recover of and from such under-tenant or under-tenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day then a proportion, of such rent according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances or a proportionable part thereof respectively.

ROCKINGHAM v. PENRICE.

CHANCERY, BEFORE SIR JOHN TREVOR, M. R., 1711.

[Reported 1 P. Wms. 177.]

SIR JAMES OXENDEN before marriage, and in consideration of £10,000 portion, settled an estate upon his lady (the plaintiff, the Lord Rockingham's sister) for her life for her jointure, with a power for himself to make leases at the usual rent.

Accordingly Sir James made leases pursuant to the power, of several parts of the land comprised in this settlement, reserving the rent at Lady Day and Michaelmas, and died upon Michaelmas Day between three and four in the afternoon and before sunset. And one of these several lessees, to whom the leases were made, paid his rent (being £18), unto Sir James Oxenden in the morning of the said Michaelmas Day; but the other tenants had not paid their rent, the arrears whereof came to about £500.

Hereupon the sole question was, Whether these arrears did belong to the defendants, the executors of Sir James Oxenden the lessor, or to the jointress?

For the former it was insisted, that when Michaelmas Day came, the rent was due on that day, and therefore, according to *Clun's Case*, 10 Co. 127 b, if on Michaelmas Day, being the rent day, the tenant pays the rent in the morning to the lessor, who dies before noon, this payment, though voluntary, is a good payment against all but the King; so that it is not material that the payment was not compulsive, or that there was no remedy for it by debt or distress: in regard it appears by that book, that the payment, though voluntary, is notwithstanding good against the heir. And the case in 1 Saunders, 287, of *Baskerville v. Mayo*, was by the counsel denied to be law, where it is said to be the opinion of Hale, C. J., that if one leases for years, rendering rent, and

dies on the rent day after sunset and before midnight, this rent shall go to the heir, and not to the executor, for that (as it is there said) though a convenient time before sunset is the proper time to demand the rent, yet it is not due until "the end of the day, *videlicet*, twelve of the clock at night," which they objected was not law; since at furthest the rent was due from the tenant to the lessor at sunset; for a convenient time before sunset, for the telling the money, was the time for the landlord to demand his rent; upon non-payment of which the lease might be avoided.

But it would be absurd to say the lessee should forfeit the lease for non-payment of the rent before it was due; and a case was cited betwixt *Bellasis* and *Cole* at the Assizes at Durham before Mr. Justice Tracy, where one granted a rent-charge for life, payable at Lady Day and Michaelmas; the grantee died on Michaelmas Day after sunset; and the question was, Whether the executor of the grantee should have the rent? And for that the grantee lived until after sunset, which was the legal time for demanding the rent, though he died before twelve of the clock at night, yet it was held by that judge, that this rent should go to the executor. Besides, it was observed that according to the other construction, if the jointress, in the present case, should live but one half year after the death of the husband, she might have a *whole* year's rent, which would be unreasonable.

But on the other side it was argued, and solemnly decreed by the MASTER OF THE ROLLS, that the lessor, in the principal case, dying before sunset, and there being no remedy for the lessor against the lessee, before his [the lessor's] death, to compel the payment of this half year's rent; and upon the authority of *Clun's Case*, the half year's rent reserved payable at Michaelmas should, upon the death of the lessor before sunset, go to the jointress, who then had the reversion.

But that as to the £18 rent paid by one of the tenants to the lessor upon Michaelmas Day in the morning, this was a good payment as to the lessee the tenant, and he should not be compelled to pay the same over again; but that the executors of Sir James, that received this half year's rent, should pay and account for the same unto Lady Oxenden the jointress.

Q. As to the last point; for if the £18 rent was a good payment at law (as certainly it was according to *Clun's Case*), why must it not be so in equity?

See the case of *Lord Strafford v. Lady Wentworth*, where Sir Henry Johnson, tenant for life, remainder to his wife, Lady Wentworth, for life, made a lease at will rendering rent; and died on Michaelmas Day betwixt three and four in the afternoon, and before sunset; and Lord Strafford, as administrator to Sir Henry Johnson, claiming the rent,

Lord Chancellor Macclesfield held Lord Strafford well entitled thereto; and cited the above-mentioned case of *Cole v. Bellasis*, and said there was a diversity between a rent incident to a reversion that must go somewhere (if not to the executor, then to the heir), and where the rent

was to go nowhere, unless to the executor; in the latter case, if the lessor lived to the beginning of that day, at which time a voluntary payment of the rent might be made, this would be sufficient to entitle the executor or administrator to the rent, rather than that it should be lost; for it would be strange if the tenant should pay the rent to none; and as that case was, the person in remainder (viz. the jointress) could have no pretence to the rent, it being a lease at will, and consequently such as could have no continuance with respect to her.

JENNER v. MORGAN.

CHANCERY. BEFORE LORD COWPER, C. 1718.

[Reported 1 P. Wms. 391.]

THE father being tenant for life, remainder in tail to the son the plaintiff, the father was indebted by several judgments, and his land extended by J. S. a judgment creditor, who leased the same to the defendant, rendering £160 *per annum* payable quarterly.

March 6, 1710, the father the tenant for life died, and the defendant the tenant continuing in possession until after the Lady Day following;

It was insisted for the plaintiff that the Lady Day's rent (being £40) ought to be paid to the plaintiff by the defendant the tenant, for that the defendant, by his holding over, showed his election to continue tenant at will to the plaintiff the son; and that this could be no hardship on the tenant, since in all events he ought to pay his rent to some person, and J. S. the judgment creditor could have no pretence to the Lady Day's rent; and though, in this case, the tenant for life died 6 March, the reason had been the same, if he had died the day after Christmas Day.

LORD CHANCELLOR. There are several remedial Statutes relating to rents, but this is *casus omisus*; the law does not apportion rent in point of time, and I do not know that equity ever did it; this is an accident which the judgment creditor might have guarded against by reserving the rent weekly; so that it is his fault, and becomes a gift in law to the tenant.

Whereupon the COURT held, that as to the profits from the end of the last quarter to the death of the tenant for life, the tenant should pay nothing; but for the profits, from the death of the tenant for life, the tenant the under-lessee was to account to the plaintiff; and with regard to the notion that the tenant's remaining in possession showed his election to continue at the old rent; this, the COURT said, only showed his election from that time, and not from the end of the preceding quarter day.

WEBB v. RUSSELL.

KING'S BENCH. 1789.

[Reported 3 T. R. 393.]

THIS was an action of covenant. The declaration stated an indenture of 26th October 1780, by which William Stokes, and R. Webb who was described to be the mortgagee of the premises in question, demised them to the defendant for 11 years, from the 29th September then last, at the yearly rent of £200 payable to Stokes or his assigns; in which were contained covenants on the part of the defendant with Stokes and his assigns (*inter alia*) to pay the rent, and to keep the premises in repair. It then stated that R. Webb at the time of the lease was possessed of the premises for the residue then to come and unexpired of a term of 99 years, commencing on the 24th of June 1770, subject to an equity of redemption by Stokes on payment of a certain sum with interest to R. Webb. That the defendant entered on 26th October 1780, and became possessed for the term of 11 years, the reversion thereof for the term of 99 years belonging to R. Webb, subject to such equity of redemption, and the further reversion in fee belonging to one G. Medley. It then stated that by indentures of lease and release of the 23d and 24th March 1781, Medley granted the reversion in fee, expectant on the determination of the term for 99 years, to Stokes and Morgan Thomas; who, by indentures of lease and release, dated 26th and 27th March 1781, and made between Stokes and Thomas of the first part, R. Webb of the second part, and Makepeace Thackeray of the third part, granted it to Thackeray his heirs and assigns in trust for R. Webb his heirs and assigns, subject to a proviso for redemption on payment of a certain sum of interest by Stokes to R. Webb on a day therein mentioned and since past. That on the 30th May 1785 R. Webb died, having first made his will; by which he bequeathed to the plaintiff all his worldly estate, and appointed her sole executrix; that she proved the will, took upon herself the burden of the execution of it, *assented to the said bequest*, and claimed to have the reversion of the premises for the residue of the term of 99 years (subject to Stokes's equity of redemption), and the money thereupon secured to R. Webb, as legatee; *and by virtue of that bequest, assent, and claim*, she became possessed of the said reversion for the residue of the term of 99 years, subject, &c. That by indentures of lease and release, dated 12th and 13th February 1787, and made between Thackeray of the first part, Stokes of the second part, and the plaintiff of the third part, Thackeray and Stokes granted and released to the plaintiff the reversion of the premises in fee, freed and discharged from all right and equity of redemption whatsoever; by virtue whereof she became and was and still is *seised*

in fee of the reversion of the premises, immediately expectant on the determination of the term of 11 years. The declaration concluded with setting forth two breaches of covenant; the one for non-payment of one year and one quarter's rent, due at Lady Day 1788; and the other for not keeping the premises in repair.

To this there was a general demurrer; and joinder.

Shepherd, in support of the demurrer.

Marryatt, contra.

Cur. adv. vult.

LORD KENTON, C. J., now delivered the opinion of the judges then in court.

I cannot conceive why the plaintiff has introduced into her declaration many facts there stated. If there were no other objection against the plaintiff's recovering in this action, the pleader has raised some difficulty to himself by stating that the plaintiff, who was executrix, *assented to the legacy to herself*, and took the term *in her own right*; for in some views of this question, the action possibly might have been sustained, if the plaintiff had sued as executrix; because nothing is clearer than that a term which is taken in *alieno jure* is not merged in a reversion acquired *suo jure*.

It is extremely well settled at common law, without referring to the Statute 32 H. 8, c. 34, that covenants which run with the land will pass to the person to *whom the land descends*. And that Statute enacted, for the benefit of the *grantees* of reversions, that they should have the like advantages against the lessees, their executors, &c. by entry for non-payment of the rent; and should have and enjoy all and every such advantages, benefits, and remedies, by action only for not performing other conditions, covenants, or agreements, contained in the leases, against the lessees, as the lessors or grantors had. The Statute also contains a clause, giving the *lessees* the same remedy against the grantees of the reversion which they might have had against their grantors. Therefore under this Statute the grantees or assignees stand in the same situation, and have the same remedy against their lessees, as the heirs at law of individuals, or the successors (in the case of corporations), had before the Statute. It becomes therefore necessary to inquire whether this action of covenant could have been maintained by the heirs of the person from whom the plaintiff derives her title. I have already observed upon the introduction of one fact into this case, which might have been omitted; there is also another, which deserves some observation here. It is stated that Stokes was only a mortgagor, who had parted with his whole term to the mortgagee; and the declaration goes on to state that the whole interest which was vested in him he had transferred to the mortgagee. Therefore, in point of law, I cannot conceive how this covenant made with Stokes can be said to run with the land; for Stokes is stated in the declaration to have no interest whatever in the land, and yet both the *implied* covenant, arising from the "yielding and paying," and also the express covenants are entered into with Stokes. It is not sufficient that a covenant is concerning the

land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties. But here Stokes had no interest in the land of which a court of law could take notice; though he had an equity of redemption, an interest which a Court of Equity would take notice of. These therefore were collateral covenants. And though a party may covenant with a stranger to pay a certain rent in consideration of a benefit to be derived under a third person, yet such a covenant cannot run with the land.

But even supposing that these covenants had been entered into (not with Stokes but) with Webb, who had an interest in the land, the subsequent transaction, which is stated in the declaration, puts an end to this question. It appears that the person entitled to the reversion of the 99 years term, expectant on the determination of the 11 years term created by the lease, afterwards acquired in her own person the absolute inheritance of the land; in consequence of which the reversion attendant on the lease granted to the tenant no longer existed. Another estate, totally different, arose by the extinguishment of the intervening estate. Many cases were cited on this subject; one of which, *Moor. 94*, is very applicable. There a person made a lease for 100 years, and the lessee made an underlease for 20 years, rendering rent, with a clause of re-entry; afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term; and it was held that the grantee should not have either the rent, or the power of re-entry; for the reversion of the term, to which they were incident, was extinguished in the reversion in fee. And though this case was only determined at the Assizes, yet it was afterwards recognized in the court.

Considering then that these are covenants entered into with a stranger that do not run with the land, considering also that the rent is incident to the reversion out of which the term is carved, and that that reversion is gone, it seems to me, with all the inclination which we have to support the action (and we have hitherto delayed giving judgment in the hopes of being able to find some ground, on which the plaintiff's demand might be sustained), that it cannot be supported. The defence which is made is made of a most unrighteous and unconscious [unconscientious?] nature: but unfortunately for the plaintiff the mode which she has taken to enforce her demand cannot be supported; and consequently there must be

*Judgment for the defendant.*¹

¹ *Stevenson v. Lambard*, 2 East, 575 (1802), which comes here in chronological order, has been printed *ante*, p. 679.

SMITH v. RALEIGH.

NISI PRIUS. 1814.

[Reported 3 Camp. 513.]

ASSUMPSIT for the use and occupation of a house and garden. Plea, the general issue.

It appeared, that after the defendant had agreed to take the premises at an entire rent, and possession had been delivered to him, the plaintiff railed off a part of the garden, and built a privy upon it, for the use of a number of his other tenants. The defendant thereupon returned the keys to him.

LORD ELLENBOROUGH ruled, that this amounted to an eviction from part of the demised premises; which, the taking being single, and the rent entire, he considered a complete answer to the action.

Plaintiff nonsuited.

Topping and Puller for the plaintiff.

Garrow, A. G., for the defendant.¹

BURN v. PHELPS.

NISI PRIUS. 1815.

[Reported 1 Stark. 94.]

ASSUMPSIT for use and occupation.

The defendant being tenant to the plaintiff of premises in Worcestershire at £130 *per annum*, under-let the premises to Badger and several other under-tenants; during this tenancy and the under-tenancies, the plaintiff gave notice to Badger and the other under-tenants to quit, and Badger had in fact quitted, and the premises occupied by him worth £60 *per annum* remained unoccupied for one year; at the expiration of the year Phelps again under-let them to another tenant; and he still continued in possession of the whole by his under-tenants; the defendant had paid into court a sum which covered all the rent claimed except the £60, which he insisted upon was not due to the plaintiff.

LORD ELLENBOROUGH was of opinion, that under the circumstances

¹ This case was recognized by Dallas, J., in *Stokes v. Cooper*, Worcester Lent Assizes, 1814, in which the rule was laid down, that after eviction from part, the landlord cannot recover upon the original contract, and the tenant, by giving up possession of the residue, is entirely discharged; but that if the tenant, after the eviction, continues in possession of the residue, he may be liable upon a *quantum meruit*. *Vide Dalton v. Reeve*, *Ld. Raym.* 77; *Clun's Case*, 10 Rep. 123. — REP.

See *Tomlinson v. Day*, 2 Brod. & B. 680; s. c. 5 Moore, 558.

the plaintiff was guilty of an eviction as to the premises occupied by Badger, at the least, and suggested that an eviction might have been pleaded to the whole demand. Upon signifying this opinion to the jury, the plaintiff elected to be nonsuited.

The *Attorney-General* and *Scarlett* for the plaintiff.

Park and *Marryatt* for the defendant.

THORN v. WOOLLCOMBE.

KING'S BENCH. 1832.

[*Reported 3 B. & Ad. 586.*]

COVENANT. The declaration stated that by indenture made between Peter Paige, the testator, of one part, and the defendant of another, it was agreed that the defendant should retain in his hands a certain sum of £300 in the indenture mentioned during a certain term created by lease of the 16th of July, 1818; and that if P. P. should during that term pay the rent reserved by the lease, and fulfil the covenants therein, the defendant would pay interest on the £300 to P. P.; and after the expiration of the said term, or the extinguishment of a certain indenture of lease of the 1st of December, 1759, by surrender or otherwise, and the payment by P. P., his executors, &c., of the before-mentioned rent, down to the time of such extinguishment, he, the defendant, would pay over to P. P., his executors, &c., the said sum of £300. Averment, that before any of the rent became due, to wit, on, &c., all the residue of the term granted by the lease of 1759 legally came to the defendant, who was then seised in fee of and in the reversion of the premises demised by that lease expectant on the determination of the term thereby granted, whereupon and whereby the residue of the said term became merged in the said inheritance of the defendant, and utterly extinguished; and that until that time P. P. kept all the covenants in the indenture of 1818 on his part to be performed. Breaches, that the defendant did not pay the interest, and that although the residue of the term granted by the lease of 1759 became merged and extinguished as aforesaid, the defendant did not pay the £300. There was another count stating particularly the manner in which, as it was alleged, the residue of the term became merged in the defendant's estate in fee. Pleas, *non est factum*, and a special plea, among others, denying that the residue of the term in the lease of 1759 became merged or extinguished as stated in the declaration. There was also a plea of set-off for moneys paid, &c. At the trial before *Park, J.*, at the Exeter Spring Assizes, 1831, a verdict was found for the plaintiff, subject to the opinion of this court on the following case:—

By indenture dated 1st of December, 1759, certain premises were

demised to three parties therein named for ninety-nine years, if William Hicks, Philip Hicks, and Mary Hicks should so long live, subject to certain rents, &c. The term so created passed by an indenture subsequently made, to William Hicks, Philip Hicks, and John Hicks. By indenture bearing date 16th of July, 1818, between these three last-mentioned persons of the one part, and Peter Paige, the testator, of the other, it was witnessed that, for the considerations therein mentioned, the three Hickses did demise, lease, set and to farm let unto Paige the said premises (then in the possession of W. and J. Hicks and of the said Paige) excepting as in the original lease was excepted, to hold from the 25th of March, 1821, for sixty-two years thence next ensuing if the right and interest of the Hickses should so long continue, at the yearly rent of £63 as therein mentioned. The indenture (which, as well as the deeds after-mentioned, was to be taken as part of the case) contained covenants for payment of rent to the Hickses, and of heriots, for repairing, for keeping all the covenants in the original lease, so that the same might not be forfeited, for payment of taxes, &c., then payable or thereafter to be imposed, and for re-entry by W., P., and J. Hicks, in case the rent should be unpaid, or the covenants in that and in the original lease not performed.

By indentures of lease and release bearing date the 3d and 4th of May, 1810, James Barry, in whom the fee in the premises then was, conveyed the said fee to Paige to the uses, and upon the trusts, and in the manner therein mentioned; and in 1817 Paige demised the premises to one Chapman for one thousand years from the day preceding the demise, as security for £1000.

By lease and release, bearing date the 24th and 25th of August, 1820, between Peter Paige of the one part, Chapman of another part, and the defendant of another part, reciting the indentures above mentioned, and that W., P., and J. Hicks had become entitled to the premises for the remainder of the said term of ninety-nine years, determinable on the deaths of William and Philip Hicks; reciting, also, an assignment by Philip (executed just before the present lease and release) of his share in the premises during the remainder of the term to Paige, so that (as was alleged) Paige then had the fee-simple and inheritance of the premises, subject to the payment of £42 *per annum* to William Hicks and John Hicks during the said term: reciting, also, that the defendant had agreed for the purchase of the fee-simple and inheritance in possession of the said hereditaments and premises for £2245, and that Chapman had been applied to, and had agreed, to join in the conveyance on being paid his £1000, and to surrender his term of one thousand years to the intent after mentioned: and further reciting that it had been agreed between the said Peter Paige and the defendant, that £300, part of the said sum of £2245, should be retained by the defendant as after mentioned: It was witnessed, that in consideration of £1000 then paid by the defendant to Chapman, and £945 to Paige, and of the £300 so to be retained, Paige conveyed the premises to the defendant in

fee, and Chapman assigned to the defendant the said term of one thousand years and the interest created by the said indenture of mortgage, in order that such term and interest might absolutely vest in the defendant, and merge in the inheritance conveyed to him by Paige. It was further declared and agreed that the defendant should retain the £300, upon trust, that if Paige, his heirs, executors, &c., should pay the rent and perform the covenants mentioned in the lease of 1818, and save the defendant harmless therefrom, then the defendant should pay five per cent *per annum* interest thereupon, and after the expiration of the said term, or extinguishment of the said lease of 1759 by surrender or otherwise, pay over the said £300 to Paige, his executors, &c. Evidence was given on behalf of the defendant, to show that he had paid the £42 a year to the Hickses during the life of Paige, with his consent, and, after his death (which happened in 1826), with the consent of the plaintiff.

Upon these facts, if the court should be of opinion that, by the operation of the deeds of July 16th, 1818, and August 24th and 25th, 1820, the term created by the deed of 1759 became extinguished in the reversion in fee, and the entire freehold passed from Paige to the defendant, and that the defendant, therefore, was bound to pay the £300 to Paige, and interest upon it until payment, the verdict was to stand for such sum as the plaintiff should appear entitled to; if not, a nonsuit to be entered. This case was argued¹ on a former day of the term by

Follett, for the plaintiff.

R. Bayly, contra.

Cur. adv. vult.

LORD TENTERDEN, C. J., now delivered the judgment of the court. This cause came before the court upon a special case; the question being whether a term of years granted in the year 1759 had become merged in the fee and inheritance of the land thereby demised.

The action was covenant on an indenture made in August, 1820. (His Lordship then stated the pleadings which are set out above.) By the special case it appears that the lease of 1759 was for a term of ninety-nine years, if three persons of the name of Hicks should so long live. This lease afterwards became vested in two of those persons, and another of the same name; and in the year 1818, the persons in whom it was so vested, executed a deed purporting to be a demise of the land to Peter Paige for the term of sixty-two years, if their right and interest should so long continue, at the yearly rent of £63, payable in equal third parts to each of those three persons; the *habendum* being from the 25th of March, 1821. Before the date and execution of this deed, Peter Paige had become the purchaser of the fee of the demised land, and had mortgaged it for a thousand years to one Joseph Chapman as a security for £1000.

In 1820 Peter Paige sold and conveyed the land to the defendant by the indenture on which the action was brought. To this indenture the

¹ Before LORD TENTERDEN, C. J., LITTLSDALE, PARKE, and PATTESON, JJ.

Hickses were not parties, but Joseph Chapman was a party and received his mortgage money, and assigned his term to the defendant, that it might be merged in the inheritance. The deed executed by the Hickses to Paige was recited in this conveyance to the defendant, and it is obvious that all the parties to that conveyance considered the instrument to be a good lease, and the rent of £42 (Peter Paige having purchased the share of one of the Hickses) to be a charge upon the land, and provision was made for indemnifying the defendant against it. It was so considered during the life of Peter Paige, and the £42 a year was paid for some short time after his death.

But it was now contended that the instrument executed by the Hickses in 1818 was not a lease, but operated in law as an assignment of the entire residue of the term granted by the lease in 1759: and that although that term might not be merged in the inheritance immediately by reason of the intervening term of years then vested in Chapman, yet that it did become merged by the operation of the conveyance in 1820 as soon as the term came *in esse*, if not before, and consequently the £42 a year was no longer a charge upon the land.

We have reluctantly come to that conclusion, by reason of the prejudice to the Hickses; but the principles of the law on this subject are plain, and the authorities quoted by Mr. Follett are unanswerable.

The deed of 1818 left no reversion in the Hickses; their entire interest passed by it; and when that takes place, the deed operates as an assignment, whatever be the form of words used in it.

That entire interest, having thus become vested in Peter Paige, passed by his conveyance to the defendant: the intervening term of one thousand years was merged, and the term created by the lease of 1759 became merged also.

On the behalf of the defendant, however, it was urged that no entry being stated in the case, the term was not vested, but the defendant had only an *interesse termini*. It is not necessary to consider what might be the effect of such an interest, because it is not usual to aver an entry in a special case, whatever may be necessary on a special verdict, and the facts stated furnish sufficient evidence of an entry, because the £42 was paid for some time after the 25th of March, 1821, and at least on one occasion by the defendant himself.

Postea to the plaintiff.

NEALE v. MACKENZIE.

EXCHEQUER CHAMBER. 1836.

[Reported 1 M. & W. 747.]

WRIT of error on the judgment of the Court of Exchequer, reported 2 C. M. & R. 84.

Bompas, Serjt., for the plaintiff

Cleasby, for the defendant.

LORD DENMAN, C. J.¹ This is an action of trespass for entering the plaintiff's dwelling-house, and taking his goods.

The declaration is dated the 25th of April, 1834. The defendant, on the 24th of May, 1834, pleaded that he, being seised of the dwelling-house and certain other premises, demised the same to the plaintiff for one year from the 25th of June, 1833, at the rent of £70, payable quarterly; that the plaintiff accepted the lease, and, by virtue of the said demise, entered into and upon the said demised premises, and thereupon became and yet was possessed thereof for the said term so granted to him as aforesaid; and, until the 25th of December, 1833, and from thence until and at the time when, &c., held and enjoyed the dwelling-house and premises by virtue of the said demise; that on the said 25th of December, 1833, £35 of the rent was in arrear, wherefore the defendant entered and made a distress for the same.

The plaintiff, on the 6th of December, 1834, replied that one Adam Charlton, before the demise in the plea mentioned, and from thence and still was in possession of eight acres of land of the said demised premises, under and by virtue of a demise theretofore made by the defendant to him, which demise was then and *from thence had been and still was in full force and undetermined*, whereby the plaintiff did not and could not enter into the possession of, or hold or enjoy the said last-mentioned land, so being parcel of the demised premises in the plea mentioned; and although he had been willing and desirous of entering, he had been kept out of possession by Adam Charlton by virtue of the demise to him, and the plaintiff had been prevented from holding and receiving the profits.

The rejoinder alleges that the plaintiff, at the time of his entering on the demised premises, had notice that Adam Charlton was in possession of the eight acres as tenant to the defendant, under a demise for a term then unexpired.

To this rejoinder there is a special demurrer, for inconsistency with the plea and departure therefrom.

The question to be determined is, whether the replication be an answer to the plea.

It has been argued that the impediment to the plaintiff's obtaining

¹ The opinion only is here given.

possession of the eight acres demised to Adam Charlton by the defendant previously to the demise made to the plaintiff, is in the nature of an eviction. On one side it is contended that it is analogous to an eviction by title paramount, the right of Adam Charlton being prior to the demise made by the lessor, and to the title acquired under that demise by the lessee; and on the other side, that it is analogous to an eviction by the tortious act of the lessor, since the impediment arises from the wrongful act of the lessor himself in demising land which he had already parted with; and is not to be distinguished in principle from the case of an entry upon the lessee under a demise made by the lessor to a stranger immediately after possession taken by the lessee.

If the former of these views be adopted, the rent will be apportionable, and the distress justified by the plea: for it is clear that a person may distrain for apportionable rent; and, if the defendant was entitled to distrain at all, the action of trespass cannot be maintained. If the latter view be correct, the defendant was not entitled to distrain at all, so long as the plaintiff was kept out of possession of any part by his wrongful act.

But, we are of opinion that the impediment to the plaintiff's taking possession in this case, is not analogous to an eviction: for it appears to us that no interest in the eight acres previously demised to Adam Charlton passed to the plaintiff by the demise subsequently made to him. The demise to Adam Charlton covered the whole time during which the rent distrained for accrued.

But it has been supposed, that notwithstanding the demise to Adam Charlton, by which the defendant had parted with his right of possession in the eight acres, the plaintiff by his subsequent lease took an *interesse termini* in these eight acres for the period of his own lease, viz., one year, so as to give him a right to a term for all that period, and to the possession on the determination of the prior lease by efflux of time, or by any other lawful mode, whenever and in whatever way it should be determined; and that the existence of the prior demise being the impediment by which alone the plaintiff was prevented from obtaining possession under the demise to him, the case must be governed by the same principle as that of an eviction by title paramount: and, if any interest in the eight acres did pass to the plaintiff under the demise to him, we might possibly be disposed to accede to this view of the case; considering that eviction by title paramount means eviction by a title superior to the titles both of lessor and lessee; against which neither is enabled to make a defence.

It appears to us, however, upon authority which we do not feel ourselves at liberty to dispute, that the demise to the plaintiff of the eight acres in question was wholly void.

It has been already observed that the demise to Charlton made previously to the demise to the plaintiff, covers the whole of the plaintiff's term; or at least the whole period for which the distress was made. Now, it is expressly laid down in Bacon's Abr., Leases (N.), (which is

to be considered as the language of Lord Chief Baron Gilbert) as follows: "If one make a lease to A. for ten years, and the same day make a parol lease to B. for ten years of the same lands, this second lease is absolutely void, and can never take effect either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void, as if none such had been made. The reason whereof is, because the first lease being made for ten years, the lessor during that time had nothing to do with the possession, or to contract with any other for it; and the second lease being made the same day, and for no longer term than the first ten years, would not pass any interest as a future *interesse termini* certainly; for the first lessee had the whole interest during that time; and his forfeiture or determination of it sooner, which was perfectly contingent and accidental, shall never make good the second lease as a future *interesse termini*, when at the time of making thereof it was absolutely void for want of a power in the lessor to contract for it; and as a reversionary interest it cannot be good for want of a deed." And a little further on, "But now, if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years, and void for the first ten years for the reasons before given, but for the last ten years it had been good; because, when the first ten years were elapsed, the second lessee might then execute and reduce into possession by entry as well as if it had been at first made in possession; for, it had been good for the whole twenty years if the first lease had not stood in the way, and that can stand in the way no longer than it continues, and therefore, by its termination, lets in the second lease; but, as a grant of the reversion such second lease could not be good for want of a deed, for the reasons before given, neither could any attornment help it or let in the second lease, till the first ten years ran out by effusion of time." And afterwards it is said that if, after a lease for ten years, a second lease by deed poll were made for twenty years, it might take effect with attornment as a grant of the reversion, or, if no attornment could be had, "yet it would inure as a future *interesse termini* for the last ten years, and would be absolutely void for the first ten years, as much as if it had been made by parol."

It has been remarked that the doctrine here laid down is derived from the argument of counsel in the case of *Bracebridge v. Clouse*, in Plowd. 421; but it may be answered, that although the matter introduced into Bacon's Abridgment is first distinctly found in the argument set forth at length in Plowden, it now stands upon the authority of Lord Chief Baron Gilbert. Moreover, the point immediately under consideration in this case is confirmed by the opinion of Gawdy, J., in *Dove v. Willcot*, Cro. Eliz. 160, who says: "If a lease be made for two years, and after the lessor let the land for four years, this is but a

lease for two years, *although the first lessee surrender*, for he had no power to contract for the first two years at the beginning; but otherwise when the estate is determinable upon an uncertainty;” and cites Plowd. Comment. *Smith and Stapleton's Case*, which is the case where the argument is fully stated, — fo. 432.

It may be remarked also that in Comyns's Digest, title Estates (G. 13), it is said that a lease which cannot take effect in interest, except by possibility, if it be not an estoppel, shall be void; as, if tenant in fee leases by parol to A. for nine years, and the same day to B. for nine years, the lease to B. shall be void. For this he cites Plowden, 432; and though this statement be only part of the language of the apprentice who argued the case of *Smith v. Stapleton*, Chief Baron Comyns, by introducing it in this general way, must be considered as adopting it in some degree at least as authority; in what is said by Gawdy, as referred to in Cro. Eliz. 160, there is afterwards added *Smith v. Stapleton*, Plow. 426, though it is not clear whether this be his language or that of the reporter.

This same doctrine, as far as regards a second parol lease for years after a former lease for years, appears to have been treated as clear law in various books; though the effect of such a lease made after a prior lease for life, has been the subject of discussion. See Bro. Abr. Lease, pl. 35, 48; Plowden, 521, note of the reporter. *Welchden v. Elkington*, Plowd. 521; Plowden's Queries, 122 and 161; *Sir Hugh Cholmondeley's Case*, Moore, 344, in the argument of Cook, Attorney-General. So, in *Watt v. Maydewell*, Hutton, 105: “If a man make a lease for twenty-one years, and after makes a lease for twenty-one years by parol, that is merely void; but if the second lease had been by deed, and he had procured the former lessee to attorn, he shall have the reversion.” *Edward v. Staler*, Hardr. 345, *arguendo*. So, Sheppard's Touchst. 275 b.: “If the second lease be for the same or a less time, as, if the first lease be for twenty years, and the second lease be for twenty or for ten years, to begin at the same time, these second leases are for the most part void;” but if the second lease be by fine, deed indented, or poll, it may pass the reversion with attornment when attornment is necessary, and without, if not necessary. But if the second lease be by *word of mouth*, it is otherwise. . . . And if the second lease be by *fine, or deed indented*, then it may work by way of *estoppel* both against the lessor and the lessee; so that, if the first lease happen by any means, as, by surrender or otherwise, to determine before it be run out, then the second lessee shall have it.”

Upon these authorities, therefore, we feel ourselves obliged to hold that the lease to the plaintiff was utterly void, so far as regarded the eight acres demised to Charlton.

If that be so, we are unable to distinguish the case in principle from that of *Gardiner v. Williamson*, 2 Barn. & Adolph. 336, where the tithes of a parish, together with a messuage used as a homestead for collecting the tithes, having been demised by parol at a rent of £200

per annum, and a distress made for arrears, the Court of King's Bench held that an action of trespass would lie, because the demise of the tithes, being by parol, was void. There was no valid demise, it was said, of the whole subject-matter, nor any distinct rent reserved for that part of it upon which there might have been a legal distress. That case was the stronger, because it was contended that the whole rent must be taken to be issuable out of the corporeal hereditament, upon which alone a distress could be made. And accordingly, in a case of a lease by indenture, Dyer is reported to have held (Moore, 50), that, if lands at common law and copyhold lands are leased by indenture rendering rent, all the rent is issuing out of the lands at common law; for the lessor had no power to make such a lease of copyhold, wherefore as to this the lease is utterly void; but it is added, that if a man lets lands, parcel of which he is seised of by disseisin, then the rent is issuing out of all the land, and by the entry of the disseisee the rent shall be apportioned, because the lease of this was not void but voidable. In this last case the tenant took an interest, and enjoyed all the lands demised till the time of his being evicted from a parcel thereof by the disseisee, and was therefore liable in respect of such interest and enjoyment to a portion of the rent. In the case before the court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised, and to be issuing out of the whole and every part thereof; and as the plaintiff, as to a portion of the land comprised in the demise (which might be great or small, as far as the principle is concerned), has taken no interest, and had no enjoyment, and is not bound by any estoppel, we are of opinion that the distress made by the defendant is not justifiable, either in respect to the whole rent reserved or any portion of it.

It may further be observed, that even supposing the plaintiff to have taken an *interesse termini* in the eight acres, capable of being executed by entry in case the demise to Charlton should happen to be forfeited or surrendered, yet, as that demise to Charlton was in force at the commencement of the plaintiff's tenancy, and continued during the whole period, in respect of which the distress has been made, no demise of those eight acres to the plaintiff ever took effect; and, consequently, no right to any rent in respect of those eight acres has ever come into existence. And we are not aware of any case where an entire rent reserved has been held to be apportionable, in which the tenant has not been at some period subject to the entire rent by virtue of the demise. Here, the right of apportionment is not founded upon any eviction, or other matter occurring subsequently to the demise, but upon an original defect in the demise itself by which the entire rent was reserved. In this respect it is strictly analogous to *Gardiner v. Williamson*.

In the case of *Tomlinson v. Day*, 5 Moore, 558, which has been referred to, the landlord did not claim an apportioned part of an entire rent, either by avowry for a distress or by action for the rent. It was an action for use and occupation, in which he was allowed to make use

of an agreement for a lease (according to the express provision of the Statute 11 Geo. 2, c. 19, § 14), "as evidence of the *quantum* of damages to be recovered;" and, as the defendant had been interrupted in the full enjoyment of what had been agreed for, the plaintiff was held "entitled to recover a reasonable compensation for the property enjoyed by the defendant as an equivalent for rent." The interruption to the defendant's right of exclusive sporting was indeed compared by Lord Chief Justice Dallas and Mr. Justice Richardson to an eviction; but, if it was an eviction, it was clearly an eviction by title paramount. The agreement for exclusive sporting was not void on account of the landlord having made a prior agreement to let it to some other person; but it was defeated, because other persons interfered who had a right superior to that of the landlord. Supposing the circumstances, therefore, to amount to an eviction, it would be a case of apportionment according to the acknowledged rule; and would not assist the argument in favor of the defendant.

Upon the whole, therefore, we are of opinion that the judgment of the Court of Exchequer ought to be reversed.

*Judgment reversed.*¹

MORRISON v. CHADWICK.

COMMON PLEAS. 1849.

[Reported 7 C. B. 266.]

COLTMAN, J., delivered the judgment of the court.²

This was an action by a landlord against his tenant, founded on a promise to use the demised premises, during the continuance of the tenancy, in a tenant-like manner. The breach alleged, is, that, during the continuance of the tenancy, he used them in so untenant-like a manner that they became ruinous, &c. There was also a count for use and occupation, and there were the money counts.

To the first count of the declaration, the defendant pleaded, — secondly, that the plaintiff, during the continuance of the tenancy, and before any breach, entered into a certain part of the demised premises, to wit, the shed, and ejected, expelled, and put out the defendant from the possession thereof, whereupon the defendant, before any breach, and whilst he was so expelled, &c., wholly quitted, abandoned, and gave up to the plaintiff the residue of the demised premises, and the possession thereof, and the plaintiff has from thenceforward had the same, and the possession thereof.

To this plea the plaintiff demurred, insisting that it amounted only to an argumentative denial of the allegation that a breach was committed during the tenancy.

¹ See *Tunis v. Grandy*, 22 Grt. 109.

² The pleadings are stated in the opinion.

For the defendant, it was said, that the plea was a good plea in confession and avoidance: for, it was insisted, that, when the plaintiff entered on his tenant, and evicted him from a part of the premises, the tenant was justified in relinquishing the possession of the remainder, and was no longer bound to perform the agreement he had entered into on becoming tenant. But we are of opinion that this proposition cannot be supported.

An eviction by a landlord of his tenant from a part of the premises, creates a suspension of the entire rent during the continuance of the eviction, until the tenant re-enters and resumes possession: see the authorities cited in 1 Wms. Saund. 204, n. (2). But there is no authority for holding that the tenancy is thereby put an end to, or the tenant discharged from the performance of his covenants, other than the covenant for the payment of rent.

It may be urged, that the landlord may have evicted the tenant from the possession of a part of the demised premises, the possession of which part was the main inducement to him to enter into the covenants of the lease, and therefore that he ought not any longer to be bound by them. But it is to be borne in mind, that, in addition to the suspension of the rent, the lessee may maintain his action against the lessor for the eviction; by which, it is to be presumed that he will obtain satisfaction for any inconvenience or loss which he may suffer.

If the eviction of a part by the landlord will not discharge the tenant from the performance of the covenants of his lease, other than the covenant to pay rent, will the relinquishing the possession of the land, and the landlord's taking possession, have that effect? We think it will not; for the allegations do not show a dissolution of the tenancy by mutual consent. The tenancy, therefore, continues; and whilst the tenancy continues, the obligation to perform the covenants continues.¹ We think, therefore, the plea is bad.

The third plea alleges a surrender of the tenancy before any breach, by operation of law, — by the defendant's quitting possession of the lands demised, with the consent of the plaintiff, with the intention of putting an end to the tenancy, and by the plaintiff's accepting such possession, with the intention of putting an end to the tenancy.

It was contended, on the part of the plaintiff, that this plea was bad, on the ground that the agreement stated in the plea, would not constitute a surrender by act and operation of law; and that the plea, unless it showed a surrender, furnished no answer to the declaration. And we agree that this is so; for the breach is admitted; and, if the tenancy continued, no answer is given to it.

If, however, it ought to be held — agreeably to what is said in *Grim-*

¹ It would appear, therefore, that, where the lessor has evicted the lessee or assignee, or has taken possession with his assent, the lessee or assignee would, under a covenant to repair, be bound to re-enter upon the lessor for the purpose of doing the repairs. It would, of course, be a good answer to an action of covenant for not repairing, to say that the defendant was prevented by the plaintiff from entering. — *REP.*

man v. Legge, 8 B. & C. 324; 2 M. & R. 438 — that the plea shows a surrender by act and operation of law, we think the plea is bad, on special demurrer, as amounting only to an argumentative denial that any breach had been committed during the continuance of the tenancy.¹

Judgment for the plaintiff.

T. Jones, in support of the demurrer.

Peacock, contra.

M'LOUGHLIN v. CRAIG.

QUEEN'S BENCH, IN IRELAND. 1856.

[*Reported 7 Ir. C. L. 117.*]

THE summons and plaint claimed a sum of £150. for one and a half year's rent due out of certain premises demised by the plaintiffs and others deceased, to one William Boyd, on the 15th of July, 1833, for a term of three lives still subsisting, and renewable forever; which premises, it was alleged in the plaint, had veated in the defendant by assignment, and that since said assignment the said sum of £150 had accrued due.

To this the defendant pleaded as to £75, part of said sum of £150, that before and at the time of making the said indenture of 15th July, 1833, one Matilda M'Loughlin was by herself and her under-tenants, and still is, in possession of a portion of said premises in plaint mentioned; and that being so in possession, the plaintiffs and William Boyd in his lifetime instituted proceedings in ejectment against the said Matilda M'Loughlin, for recovery of said portion, and that Matilda M'Loughlin had recovered judgment in said ejectment against the plaintiffs and William Boyd, and before any portion of said sum of £75 became due, and has since retained and continued in possession of the said portion of the premises; and that, by reason thereof, the said William Boyd in his lifetime, and the defendant since his death, and from thence and before the time of the accruing of said sum of £75, were kept out of the possession and enjoyment of said portion of the premises, and neither he nor the said William Boyd had, since making said indenture, or since said judgment in ejectment, any use, possession, or enjoyment of the said portion. To this defence the plaintiff demurred.

Mackay (with him *T. O'Hagan*), in support of the demurrer.

Concannon and *D. Lynch*, contra.

LEFROY, C. J. In this case we are of opinion that this demurrer must be overruled. It is plain that, upon an eviction by title paramount, the lessee may either give up the lease or hold the part of which he remains in possession, at an apportioned rent. That is well settled. Then the question in this case is, Are the matters stated on the defence, by which the defendant says he was disabled from getting possession of

¹ The rest of the opinion, relating to another point, is omitted.

a portion of the lands, equivalent to an eviction by title paramount; that is, has enough been shown to satisfy the court that the lessee was prevented, by title paramount in Matilda M'Loughlin, from getting possession of the entire of the land demised by the lease? The defence alleges that Matilda M'Loughlin was in possession of part of the premises previous to the lease being made; and that she continued in possession up to and after the making of the lease; and that subsequently an ejectment was brought by the lessor and lessee in that lease, and that they failed to disturb her possession. It must be assumed that she showed title against both parties, against the lessor antecedent to the lease, and against lessor and lessee after the lease; and that ever since, during the accrual of the rent, she continued in possession. The question then is, whether that is a substantial averment of matters whence the law deduces what may be called a *presumptio juris*, that, *de jure*, she was in possession by title paramount? When the landlord made the lease, he must have known in what condition the property stood at the time he let it; it was his duty not to make a lease to a stranger, save of what he had to demise; a stranger could not know that Matilda M'Loughlin was in possession by title paramount. He had no muniments of title; had nothing to do with the land before the lease was made to him. The lease imports that the title went with the possession; there is no recital in it of any outstanding lease, or that there was any in reversion. It was incumbent on the landlord, therefore, when he seeks to enforce the entire rent, to show his right, to establish that Matilda M'Loughlin was in possession as a sub-lessee, or in some way under him; whereas it is averred, in the defence, that the lessee never had any benefit or enjoyment under the lease of the portion of the premises in question. If anything were shown to establish that a rent had been received for this portion from Matilda M'Loughlin, by the defendant getting the reversion to which that rent was incident, that would not be inconsistent with the right of the landlord to recover the entire rent; but that averment ought to have come from the plaintiff. This defence amounts in substance to an eviction by title paramount; and as in such case the lessee is entitled to hold the remaining portion of the premises, paying a proportionate part of the entire rent, or to abandon all, so here the defendant is entitled to a similar election. This demurrer, therefore, must be overruled.

CRAMPTON, J. I do not dissent from the judgment pronounced by my Lord Chief Justice, although I feel some difficulty on the points suggested. It has never been decided that the position of a lessee, taking a lease at an entire rent from a landlord, who had power to demise a portion only of the thing demised, not having power to demise the residue, is equivalent to an eviction by title paramount. I do not think that has yet been decided, although the case cited, of *Doe v. Meyler*, comes near it. A party there made an underlease of premises, over part of which he had a power, and over another portion of which he had no power. It was held in that case that there must be an

apportionment, and that the tenant must pay the apportioned rent for the portion the landlord had power to demise. There is another question on which I also have some difficulty; that is, as to the meaning of that portion of the plea which alleges a possession in Matilda M'Loughlin, and nothing more. It is consistent with that plea that Matilda M'Loughlin may have been in a temporary possession, or she may have been a tenant of the lessor; and if that were so, the whole rent is payable to the landlord, and there is no apportionment. It is said, however, that there are statements in the plea contradictory of the presumption that Matilda M'Loughlin was in as tenant to the lessor. I feel some difficulty on these two points; but if the landlord allege she had only a temporary interest, the court will not prevent his now replying that matter, upon payment of the costs of the demurrer.

PERRIN and MOORE, JJ., concurred with the Chief Justice.

Demurrer overruled.

ECCLESIASTICAL COMMISSIONERS v. O'CONNOR.

QUEEN'S BENCH IN IRELAND. 1858.

[*Reported 9 Ir. C. L. 242.*]

ACTION to recover three half-yearly gales of rent reserved by an indenture of demise dated the 24th of April, 1846, whereby the plaintiffs demised to the defendant a certain messuage, lands, and premises, with the appurtenances, for three lives, and a concurrent term of 999 years, at the yearly rent of £400, payable half-yearly. The first defence alleged that, prior to the making the demise in the plaint mentioned, the plaintiffs had demised two roods, parcel of said demised premises, to Captain Wynder, which prior demise was still in force, whereby the defendant was kept out of possession of said parcel of the demised premises, although always desirous of entering thereon, whereof the plaintiffs had due notice; whereby the defendant was prevented from having all the profit and advantage he otherwise would have thereout. The second defence alleged a prior demise, still in force, of two roods of land, parcel of the demised premises, to one Patrick Murray and one Timothy Murray, and in other respects was in the same terms as the first defence.

Demurrer to the first defence, upon the following grounds: Because the said defence does not disclose any matter whereby the demise made by the plaintiffs to the defendant, as in the summons and plaint alleged, is shown to have been, wholly or as to any part of the premises thereby purporting to be demised, void or ineffectual, or whereby the rent reserved became or was wholly or in part extinguished or suspended; and because the said demise made by the plaintiffs to the defendant, as in the said summons and plaint alleged, was effectual to

pass the reversion of the said parcel of the said demised premises occupied by the said Captain Wynder; and because the said defence is pleaded to the whole of the said first cause of action, although, at best, only an answer to part thereof; and because it does not appear that the said Captain Wynder has, or ever had, any greater estate or interest in the said parcel of the said demised premises than that of tenant from year to year; and because it does not appear that the said defendant ever gave a proper and legal notice to quit to the said Captain Wynder, or otherwise used legal means to determine his tenancy; and because it is not shown by the said defence what estate or interest the said Captain Wynder has or had in the said parcel of the said demised premises; and because it is not alleged by the said defence that the said defendant is not in receipt of the rent payable by the said Captain Wynder in respect of the said parcel of the said demised premises; and because, consistently with the said defence, the said Captain Wynder may have always been, and still be, in occupation of the said parcel of the said demised premises, by the consent or default of the defendant himself.

The grounds of demurrer to the second defence were in similar terms to those of the first defence,¹ substituting the names of Patrick and Timothy Murray for that of Captain Wynder.

Fetherstone (with him *T. Lefroy*), for the demurrer.

M. Morris (with him *G. Fitzgibbon*), contra.

LEFROY, C. J. We are all very clearly of opinion that this defence is not a good answer to the claim for the whole rent. It would certainly be a very strange state of the law if, upon the facts which are here presented to us, we were compelled to hold it to be a legal defence, that because two roods of the demised premises were lawfully in the possession of an under-tenant at the date of the demise, that circumstance is to operate as a suspension of the entire rent of £400 a year, duly reserved and fully secured by sufficient covenants. We were, however, told that such was the law, as settled by the case of *Neale v. Mackenzie*. But it turns out that the case of *Neale v. Mackenzie*, instead of being an authority in support of the present defence, is, for the very reasons given by Lord Denman, when delivering the judgment of the Court of Exchequer Chamber, an authority for upholding this demurrer; for the distinction there taken was, that the second lease, made by the defendant in error, was utterly void, inasmuch as, with respect to eight acres, part of the demised premises, no interest at all passed to the lessee, — not even a reversion, which can only be granted by deed under seal; whereas the second lease in that case was not

¹ The points noted for argument were, first, that the said defence does not disclose any matter whereby the said demise in the plaint mentioned is shown to have been wholly or in part void, or the rent wholly or in part extinguished or suspended; secondly, that the said defence is pleaded to the whole rent, although at best only an answer to part thereof, and the points in the body of the demurrer. The points of demurrer to the second defence were precisely similar. — REP.

under seal. In the present case, however, it appears that the plaintiffs, who were seised of these lands, and made this lease, were, at the time of this demise, in possession of the great body of the property; but about two roods of it (taking the facts from the pleadings) were then in the possession of some one else, under a former lease. As to these two roods, therefore, the plaintiffs had nothing but a reversion. Under these circumstances, the plaintiffs demise the entire premises by a lease under seal, reserving an entire rent for the whole. The first question then is, What was the operation of that instrument? It was a lease in possession of all the land of which the lessors had the possession at the time of the demise; and, in point of law, it was a lease of the reversion of that part of the lands of which the lessors had not the possession. Where a person has only a reversion expectant on a lease, with a rent incident thereto, he may make a lease by deed of that reversion for any term, and reserve a rent thereout; he may deal with it as if it were an interest in possession, and he cannot be said not to have a title to such rent. He cannot, it is true, recover it by ejectment, and there may be a difficulty in the way of his distraining for it; but he can recover it either by an action upon express covenant, or by an action of debt upon the implied contract which arises upon the deed between the parties. Are we to be told then that an action for the entire rent will not lie? I am happy to find that the law, so far back as I have been able to trace it, still continues to be unchanged in this respect, and that the reasons assigned by Lord Denman, in pronouncing the judgment of the Exchequer Chamber, in *Neule v. Mackenzie*, the case which was said to have interfered with the law as I have stated it, were, on the contrary, in perfect harmony with it, established, as it has been, by the high authority of Chief Baron Gilbert, unaffected by any subsequent case. Upon these grounds, therefore, we feel quite authorized in maintaining that state of the law which is consistent as well with common-sense and justice, as with an uninterrupted current of legal authority down to the present time. We, therefore, allow the demurrer.¹

PENDLETON v. DYETT.

SUPREME COURT OF NEW YORK. 1825.

[Reported 4 Cowen, 581.]

COVENANT for rent upon a lease dated October 15th, 1818, given by the plaintiff to the defendant, for the term of two, three, five, or eight years, but not for a less term than two years, of two rooms, or the whole of the second floor, and two rooms chosen by the defendant on

¹ *Williams v. Hayward*, 1 E. & E. 1040 (1859), which comes here in chronological order at the end of the English cases, is printed *ante*, p. 700. Cf. *Blair v. Claxton*, 18 N. Y. 529 (1859).

the third floor of a certain house or store in Beaver Street, corner of William Street, in the city of New York, at a rent of \$425 *per annum*, which the defendant covenanted to pay, and entered into possession of the demised premises.

The defendant pleaded, 1st, *Non est factum*.

2. That before any of the rent became due, to wit, on, &c., the plaintiff entered upon the demised premises, and ejected, expelled, put out, and amoved the defendant, and kept and continued him so ejected, expelled, and amoved from thence hitherto.

Replication, denying the expulsion and issue.

The cause was tried at the New York Circuit, June 19th, 1823, before *Edwards*, C. Judge.

On the trial, the counsel for the defendant produced receipts for rent to the 1st February, 1820, and offered to prove that about that time the plaintiff introduced into the house demised, lewd women or prostitutes, and continued this practice from time to time and at sundry times, keeping and detaining them in there all night for the purpose of prostitution; that such women would frequently enter the house in the day-time, and, after staying all night, would leave it by day-light in the morning; that the plaintiff sometimes introduced other men into the house, who, together with him, kept company with the lewd women or prostitutes during the night; that on such occasions, the plaintiff and the women, being in company in certain parts of the house not included in the lease, but adjacent and in the plaintiff's occupation, were accustomed to make a great deal of indecent noise and disturbance, the women often screaming extravagantly so as to be heard throughout the house, and by the near neighbors; and frequently using obscene and vulgar language, so loud as to be understood at a considerable distance; that such noise and riotous proceedings being frequently continued all night, greatly disturbed the rest of persons sleeping in other parts of the house; and particularly in the parts demised; that these practices were matter of conversation and reproach in the neighborhood; and were of a nature to draw, and did draw, odium and infamy upon the house as being a place of ill-fame, so that it was no longer reputable for moral or decent persons to dwell or enter there; that all these practices were by the procurement or permission and concurrence of the plaintiff. That the defendant, being a person of good and respectable character, was compelled by the repetition of these practices to leave the house, and did leave it for that cause, about the beginning of March, 1820; and did not return. That a respectable man by the name of Fox, to whom part of the house had been underlet, left it for the same cause.

This evidence was objected to, and overruled by the judge as inadmissible upon the issue; and the defendant's counsel excepted. Verdict for the plaintiff, damages \$362.52.

H. W. Warner, for the defendant.

J. A. Dunlap, contra.

CURIA, PER SUTHERLAND, J. *Eviction* of the whole or any part

of the demised premises, is a good plea in bar to an action either of debt or covenant for the rent. In this all the authorities agree. Cruise, Dig. tit. 28, Rents, chap. 3, Woodfall, 412-13; 1 Saund. 204, n. 2, and cases there cited. The plea in this case is unexceptionable in point of form. It is according to the established precedents. *Salmon v. Smith*, 1 Saund. 203, 4, n. (2). It states that the plaintiff (who was the defendant's lessor) entered into and upon the demised premises, and ejected, expelled, put out, and amoved the said defendant from the possession thereof, and kept and continued him so ejected, expelled, &c., from thence hitherto. The only question in the case is, whether the evidence offered by the defendant, and which was rejected by the judge who tried the cause, supported the plea, or was of a character which ought to have been submitted to the jury, for them to decide whether it made out the fact of eviction or not. No actual ouster or turning out of possession is pretended. The proof offered does not show an entry by the lessor upon the premises. It does not make out even a trespass. The acts complained of as amounting to an eviction, were committed in a different part of the same house, with which the demised premises had no connection, except that the approach to each was by a common entrance. They operated not upon the physical safety of the tenant, or the physical condition of the demised premises; but upon the moral sense and feeling of the defendant. The acts were most exceptionable in themselves; and, if they could not be abated, the defendant had not only a moral right, but it was his moral duty, to abandon the scene of riot and prostitution. But they could have been abated. The law afforded a prompt and sufficient remedy. The police of the city, upon the complaint of the defendant, would have instantly taken the plaintiff and his associates into custody, and punished them by fine and imprisonment as often as the offence was repeated. There was no moral necessity, therefore, for abandoning the premises. Suppose the plaintiff had been in the habit of exhibiting himself either in the common passage or in the street opposite the premises in question, in indecent attitudes, or in a state of offensive nakedness, so that the defendant and his family could not leave his house without witnessing the disgusting exhibition: would this cause have supported a plea of eviction? They would both stand upon the footing of nuisances, which the plaintiff or any other citizen might cause to be abated. But if, instead of taking that course, he should abandon his house, it must be considered a voluntary and not a compulsory act.

But I apprehend there can be *no eviction*, without an *actual entry*. Such is the form of the plea, and the proof must sustain it. The very definition of the term "eviction" is an *expulsion* of the lessee out of all or some part of the demised premises; and Serjeant Williams says, that to occasion a suspension of the rent, the plea must state an eviction or expulsion of the lessee by the lessor, and a keeping him out of possession, until after the rent became due; otherwise it will be bad.

1 Saund. 204, n. (2). If a constructive expulsion, without entry, may constitute an eviction, which will operate as a suspension of the rent, why is the averment of an entry contained in all the precedents, and why do all the cases agree, that without such averment the plea would be bad? Thus, in *Timbrell v. Bullock*, Styles, 446, it is said that, to make a suspension of rent reserved upon a lease for years, *the lessor must oust the lessee* of part of the thing let, at least, and hold him out until after the day on which the rent is made payable by the lease; and if the lessee *re-enters*, the rent is revived. A re-entry presupposes an actual ouster or expulsion. So in *Page v. Parr*, Styles, 432, which was an action of covenant for rent, the defendant pleaded in bar, that the plaintiff entered into a part of the land demised, before the rent became due, and so had suspended his rent. The plaintiff replied that the defendant re-entered and so was possessed as in his former estate. To which replication there was a demurrer. And Rolle, C. J., held the demurrer well taken, on the ground that the replication did not state that the defendant, after re-entry, continued in possession until the rents were due; and judgment was given for the defendant. According to the case of *Salmon v. Smith*, 1 Saund. 204, and n. (2), the plea would now be held bad for omitting to state that the defendant was kept out of possession until the rent became due. But this case also clearly contemplates an actual entry or ouster by the lessor, as necessary in order to suspend the rent. So in *Reynolds v. Buckle*, Hob. 326, which was an action of debt for rent, the defendant pleaded that before rent due, the plaintiff *entered upon him*; but did not say that *he did expel him or hold him out*; and the plea, on that ground, was declared to be of itself an insufficient bar. But in that case it was cured by the verdict. *Bushell v. Lechmore*, 1 Lord Ray. 369, also decides that a mere entry or trespass without an eviction will not suspend the rent. Upon this point all the cases concur. *Hunt v. Cope*, 1 Cowp. 242, is a strong case. There the defendant pleaded that the lessor, with force and arms, entered upon the demised premises and demolished a summer-house (being a part of the premises), by means whereof the tenant had been *deprived of the use* of the summer-house, &c. This plea was held to be bad, because it did not aver an actual *eviction or expulsion of the lessee*. The defendant's counsel urged that the facts in the plea amounted to an eviction, on the ground that *an actual entry* was stated, and a destruction of a portion of the premises; and if an eviction could be constructively pleaded, this would seem to be good. But all the court held it bad, and Aston, J., says, all the cases in the books suppose *the lessee to be put out of possession*. Therefore, merely saying that he was deprived of the enjoyment of the premises is not sufficient. If it is necessary to state, in terms, that the lessee was turned out of possession, in order to make a good plea of eviction, it would seem to follow that the proof in support of the plea must be substantially of the same character. Lord Mansfield, in *Hunt v. Cope*, says that the facts there stated, might have been sufficient for the jury to have found for

the defendant under a good plea of eviction. But there, it will be recollected, *an actual entry, and a physical destruction of a portion of the premises* are averred; and if an actual ouster can be inferred from circumstances, it surely might in that case; yet Lord Mansfield considers it as matter of doubt.

In the case before us, there was not only no actual entry, but no assertion, either express or implied, of a right of entry on the part of the lessor, or of any other right or control over the demised premises. The disturbance suffered by the lessee was the consequence of conduct on the part of the lessor which partook of the nature of a nuisance, and which he had the power of abating at pleasure. He was not, therefore, constrained by any necessity, either moral or physical, to abandon the premises; and, in judgment of law, so far as this action is concerned, his abandonment must be considered voluntary. The evidence offered was properly rejected by the judge. The motion for a new trial must be denied.

*New trial refused.*¹

¹ This case was carried to the Court for Correction of Errors (8 Cowen, 727), and judgment was reversed by a vote of sixteen to six. The opinion of SPENCER, Senator, for reversal, was as follows:—

SPENCER, Senator. It seems to be conceded that the only plea which could be interposed by the defendant below, to let in the defence which he offered, if any would answer that purpose, was, that the plaintiff had entered in and upon the demised premises, and ejected and put out the defendant. Such a plea was filed; and it is contended on the one side, that it must be literally proved, and an actual entry and expulsion established; while on the other side it is insisted, that a constructive entry and expulsion is sufficient, and that the facts which tended to prove it, should have been left to the jury. It is true, that "pleading is the formal mode of alleging that on the record, which would be the support or defence of the party on evidence," as defined by Buller, J., in 1 Term Rep. 159; and the same learned judge immediately after draws the correct distinction: "whether the *evidence* in each particular case is a sufficient foundation for that support or defence, is a question that does not arise upon pleading, but upon the trial of the issue afterwards." In pleading, the legal effect of the facts is stated, not the facts themselves. The form of the plea, therefore, does not determine the kind of evidence necessary to establish it. To support a plea that the defendant never promised, he may prove a payment, or a performance of his undertaking, or some matters which excused him from its performance. A very familiar case is presented in the action of trover, which has been partly alluded to on the argument. The plaintiff alleges, that he casually lost the chattel, which the defendant found and converted to his own use. It is very questionable whether, if this were strictly proved precisely as alleged, it would support *any* action. The proof, however, to sustain it, is either that the defendant tortiously took the chattel, which is itself evidence of a conversion (and directly contrary to the allegation of *finding*), or that the defendant came legally into the possession of the article, and subsequently, on a demand made, refused to restore it to the owner. From this a conversion is implied. But it is plain it is not *proved*. So in an action against the indorser of a note, the averment of a demand of payment and of notice of non-payment, is supported by evidence of due diligence without actual demand. Again, a promise by the indorser, to pay a note, dispenses with the necessity of proving a demand and notice. There are many similar cases, where the proof of one fact justifies the legal conclusion of another fact. This, then, is a question of principle, whether the evidence offered by the defendant below tended in any manner to establish a constructive entry and eviction by the plaintiff; for if it did, it should have been left to the jury to decide on its effect.

To determine this, it seems only necessary to inquire what are the conditions,

M'MURPHY v. MINOT.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1827.

[Reported 4 N. H. 251.]

THIS was an action of covenant broken on an indenture made the 12th July, 1811, by which the plaintiff demised to Seth Daniels, a certain tract of land to hold during her natural life, and the said Daniels covenanted with the plaintiff to pay her, on the first day of May, annually, a rent of \$30.

The action was brought against the defendant, as assignee of

express or implied, on which the defendant was to pay the rent. The agreement set forth in the plea contains a covenant that the defendant shall have "*peaceable, quiet, and indisputable possession*" of the premises. This is, in its nature, a condition precedent to the payment of rent; and whether the possession was peaceable and quiet, was clearly a question of fact for the jury. Such conduct of the lessor as was offered to be proved in this case, went directly to that point; and without saying at present, whether it was or was not sufficient to establish a legal disturbance, it is enough that it tended to that end, and should have been received, subject to such advice as the judge might give to the jury.

The opinion of the Supreme Court proceeds upon the ground that there must be an actual, physical eviction, to bar the plaintiffs; and in most of the cases cited, such eviction was proved; and all of them show that such is the form of the plea. But the forms of pleading given, and the cases cited, do not establish the principle on which the recovery of rent is refused, but merely furnish illustrations of that principle, and exemplifications of its application. The principle itself is deeper and more extensive than the cases. It is thus stated by Baron Gilbert, in his essay on Rents, p. 145: "A rent is something given by way of retribution to the lessor, for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded upon this: that the land demised, is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for a thing he has not. If therefore the tenant be deprived of the thing letten, the obligation to pay the rent ceases, because such obligation has its force only from the *consideration*, which was the enjoyment of the thing demised." And from this principle, the inference is drawn, that the lessor is not entitled to recover rent in the following cases: 1st. If the lands demised be recovered by a third person, by a superior title, the tenant is discharged from the payment of rent after eviction by such recovery. 2d. If a part only of the lands be recovered by a third person, such eviction is a discharge only of so much of the rent as is in proportion to the value of the land evicted. 3d. If the lessor expel the tenant from the premises, the rent ceases. 4th. If the lessor expel the tenant from a part only of the premises, the tenant is discharged from the payment of the whole rent; and the reason for the rule why there shall be no apportionment of the rent in this case as well as in that of an eviction by a stranger, is, that it is the wrongful act of the lessor himself, "that no man may be encouraged to injure or disturb his tenant in his possession, whom, by the policy of the feudal law, he ought to protect and defend."

This distinction, which is as perfectly well settled as any to be found in our books, establishes the great principle that a tenant shall not be required to pay rent, even for the part of the premises which he retains, if he has been evicted from the other part by the landlord. As to the part retained, this is deemed such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the payment of any rent. Here, then, is a case, where actual entry and physical eviction

Daniels, for the said rent from 1st May, 1817, to the 1st May, 1825, and was submitted to the decision of the court upon the following statement of facts.

The indenture was made as stated in the declaration, and Daniels

are not necessary to exonerate the tenant from the payment of rent; and if the principle be correct as applied to a part of the premises, why should not the same principle equally apply to the whole property demised, where there has been an obstruction to its beneficial enjoyment, and a diminution of the consideration of the contract, by the acts of the landlord, although those acts do not amount to a physical eviction? If physical eviction be not necessary in the one case, to discharge the rent of the part retained, why should it be essential in the other, to discharge the rent of the whole? If I have not deceived myself, the distinction referred to settles and recognizes the principle for which the plaintiff in error contends, that there may be a constructive eviction produced by the acts of the landlord.

An eviction cannot be more than an *ouster*; and we have the authority of Lord Mansfield for saying that there may be a constructive ouster. In *Cowper*, 217, he remarks: "Some ambiguity seems to have arisen from the term *actual ouster*, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary; but that is not so: a man may come in by rightful possession, and yet hold over adversely without a title," &c.

I think the same principle governed an ancient case stated in 1 Rolle's Abridgment, 454, of which the following is a translation: "If the lessee for years of a house, covenant to repair it and leave it in as good plight as he found it, and afterwards certain sparks of fire come from a chimney in the house of the lessor, not very distant, by which the house of the lessee is burned, that shall excuse the performance of the covenant; and the lessee is not bound to rebuild, because it came of the act of the lessor himself." The analogy between the covenant to repair and that to pay rent, is sufficiently strong to justify the application of this case to the latter; and if so, it establishes the doctrine that other acts of the landlord going to diminish the enjoyment of the premises, besides an actual expulsion, will exonerate from the payment of rent.

That is precisely the principle contended for by the plaintiff in error in this case. It is a just and equitable doctrine, and has been so applied in analogous cases. In *Hearn v. Tomlin*, Peake's N. P. Cases, 192, which was an action for use and occupation of a wharf (depending on the same principles as an action on a lease for rent), the defendant had agreed to purchase the wharf under a representation of the plaintiff that he had a lease of it for 13 years, and entered into possession; but on discovering that the plaintiff had a lease for only 3 years, he refused to complete the purchase. Lord Kenyon held, that to maintain the action, it must appear that the occupation had been beneficial to the defendant, and that it appearing to have been injurious, the plaintiff could not recover.

We regard cases as containing the evidence of the law, as evincing the rule of decision; and they are consulted to ascertain the principle on which that rule is founded. The review of the cases now made, shows that the principle on which a tenant is required to pay rent, is the beneficial enjoyment of the premises, unmolested in any way by the landlord. It is a universal principle in all cases of contract, that a party who deprives another of the consideration on which his obligation was founded, can never recover damages for its non-fulfilment. The total failure of the consideration, especially when produced by the act of the plaintiff, is a valid defence to an action, except in certain cases, where a seal is technically held to conclude the party. This is the great and fundamental principle which led the courts to deny the lessor's right to recover rent where he had deprived the tenant of the consideration of his covenant, by turning him out of the possession of the demised premises. It must be wholly immaterial by what acts that failure of consideration has been produced; the only inquiry being, has it failed by the conduct of the lessor? This is a question of fact, and to

having entered under it, afterwards conveyed all his estate to one Gilman Dudley, who, on the 3d April, 1822,* conveyed the land to the defendant in fee and in mortgage. Dudley remained in possession and took the profits until his death in October, 1822, and after his decease his administratrix remained in possession, taking the profits until April, 1824. On the 16th April, 1824, a tenant entered upon part of the land under an agreement with the defendant to pay rent to him in case the land was not redeemed.

establish it, the proof offered in this case was certainly competent. I do not feel called upon to say that those facts would have been alone sufficient. Of that the jury were to judge, at least in the first instance; and the question whether they amounted to a full and complete legal defence, might have been presented in another shape. The only question for our decision is, whether that testimony ought to have been received at all? Believing that it tended to establish a constructive eviction and expulsion against the consent of the tenant; that it tended to prove a disturbance of his quiet possession, and a failure of the consideration on which only the tenant was obliged to pay rent, — I am of opinion that it ought to have been received; and that therefore the judgment of the Supreme Court should be reversed, with directions to issue a *venire de novo*.

I cannot omit the opportunity presented by this case, of observing, that it appears to me to be one of those within the view of the framers of our Constitution, in the organization of this court. When this court, of last resort, was declared to consist of the senators, with the chancellor and judges, it must have occurred, that the largest proportion of its members would be citizens not belonging to the legal profession. And it must, therefore, have been intended to collect here, a body of sound practical common-sense, which would not overthrow law, but which would apply the principles and reasons of the law according to the justice of each case, without regard to the technical refinements and arbitrary and fictitious rules, which will always grow upon professional men. And herein I conceive, is the great excellence of this court, — that whenever it perceives a rule established by the inferior courts, pushed to such an extent as to produce positive injustice, it is within its power, as it most certainly will always be its disposition, to rescind or modify such rule. Several signal examples of the exercise of this power might be cited in the decisions of this court. Were this, then, a case in which the law was considered settled by the Supreme Court, that nothing but a physical turning a tenant out of possession would exonerate him from the payment of his rent, it would be precisely such as would require and justify the interposition of this court to correct it, — not by making law, but by applying its familiar and elementary principles to a new case. Suppose the landlord had established a hospital for the small-pox, the plague, or the yellow fever, in the remaining part of this house; suppose he had made a deposit of gunpowder, under the tenant, or had introduced some offensive and pestilential materials of the most dangerous nature: can there be any hesitation in saying that if, by such means, he had driven the tenant from his habitation, he should not recover for the use of that house, of which, by his own wrong, he had deprived his tenant? It would need nothing but common-sense and common justice to decide it. No man shall derive benefit from his own wrong. The idea that the tenant has some other remedy to remove the evil, does not reach the case where the injury is already inflicted. Besides, it has been entirely exploded on the argument of this cause. For, in the very case where it is admitted the tenant would be exonerated from the payment of rent, where there had been an actual eviction and physical expulsion by his landlord, he has an adequate and effectual remedy under the Statute to prevent forcible entries.

But as has been before remarked, even the cases admit that the tenant may be exonerated from rent without a physical expulsion; and there is no necessity to call upon this court to establish the law of a new case. It is already established in conformity with what appears to me the plainest dictates of justice.

On the 23d April, 1825, the administratrix of Gilman Dudley conveyed to the defendant the right in equity to redeem the land mortgaged as aforesaid, and the defendant's said tenant has been in possession of the whole tract from that time to the commencement of this action, on the 22d March, 1826.

All the interest which the plaintiff ever had in the land was an estate for her own life, and the reversion was in Daniels.

Bell, for the plaintiff.

Upham, for the defendant.

RICHARDSON, C. J. It has been urged in behalf of the defendant in this case that the plaintiff is not entitled to recover anything, because the rent was never demanded of Minot. The law on this point is well settled. When a lessor proceeds for a forfeiture or to enforce a penalty he must show a demand of a rent on the very day it was payable. But in an action of covenant no demand is necessary. 18 Johns. 447, *Remson v. Conklin*; Com. Dig. Rent, D. 4; 2 N. H. Rep. 163, *Coon v. Brickett*.

We are therefore of opinion that this objection to the action cannot prevail.

It has also been urged that this action cannot be maintained, because the particular estate and the reversion having become united in the same person, the particular estate is merged and the rent extinguished. Had the rent in this case been incident to the reversion, it is clear that this action could not be maintained. 2 N. H. Rep. 454, *York v. Jones*. But it is well settled that the rent is not inseparably incident to a reversion. Co. Lit. 143 and 47 a; 2 Bl. Com. 176.

Rent may be reserved upon a grant of a man's whole estate, in which case there can be no reversion.

The case of *Webb v. Russell*, 7 D. & E. 393, which has been cited by the defendant's counsel does [not] apply in this case. It was there held that where rent is incident to a particular reversion, when that particular reversion is merged, the rent is extinguished. But in this case the rent was never incident to the reversion. The plaintiff granted her whole estate reserving a rent, and she had no reversion to which it could be incident.

In order to maintain this ground it must be shown that when he who has a reversion takes a lease of the particular estate and covenants to pay rent, such rent is extinguished by the union of the particular estate and the reversion. But this proposition cannot be sustained by any reason or authority, and we are of opinion that this ground of defence fails altogether.

But it is further contended on the part of the defendant that being only a mortgagee he cannot in any event be held liable for the rent until he took possession under the mortgage, and the case of *Euton v. Jaques*, Doug. 438, is cited as an authority. But that decision has been long questioned, 7 D. & E. 312, and in 1819 the question came before all the judges of England, and a great majority were of opinion

that when a party takes an assignment of a lease by way of mortgage as a security for money lent, the whole interest passes to him and he becomes liable on the covenant for the payment of rent, though he has never occupied or become possessed in fact. 1 Brod. & Bing. 72, *Williams v. Bosanquet et al.*

In this State it has been repeatedly decided that a mortgage in fee vests in the mortgagee the whole legal estate; the necessary consequence of which seems to be that such a mortgagee must be liable for the performance of covenants running with the land. And we think in this case the defendant is liable for any rent that became due after his mortgage was executed.

In considering this case, the question occurred to us whether the liability of the defendant could be affected by the circumstance that the rent was reserved upon a grant of the freehold, while the conveyance to him was in fee. But we find that it has been decided that covenant will lie against the assignee of part of an estate for not repairing his part, for it is devisable [divisible], and follows the land. Cro. Car. 222, *Congham v. King*; 2 East, 580.

And we are not able to discover any reason why he who takes a larger estate should not be bound by a covenant running with a less estate which is parcel of the larger.

On behalf of the plaintiff it has been argued that the defendant is liable in this action, not only for the rent which has become due since he became owner of the land, but the rent which became due before that time.

The cases which have been cited by the defendant's counsel seem to show that the law is not so.

It is another argument in favor of the defendant, that when the action is against an assignee, it is usual to allege in assigning the breach of the covenant, that the breach happened after the assignment. 2 Chitty's Pl. 191; Lilly, 134; 6 Johns. 105, *Dubois v. Van Orden*; Carthew, 177; 2 Ventris, 231.

It is said in Woodfall, 274 and 338, that an assignee is liable for arrearages of rent incurred before, as well as during his enjoyment; but he cites no case in which it has been so decided, and offers no argument in support of the propositions, and we are of opinion that this is not law, and there must be judgment for the plaintiff for the rent which has become due since the 3d of April, 1822.

Judgment for the plaintiff.

LEWIS v. PAYN.

SUPREME COURT OF NEW YORK. 1830.

[Reported 4 Wend. 423.]

THIS was an action of replevin, tried at the Rensselaer Circuit in July, 1828, before the *Hon. William A. Duer*, then one of the circuit judges.

The declaration was in the usual form for taking goods and chattels of the plaintiffs. The defendant put in two avowries, substantially alike, acknowledging the taking of the goods and chattels as a distress for six months rent in arrear, due 1st October, 1823, on a lease in fee of certain real estate, bearing date 1st April, 1818, executed by him to the plaintiffs. The plaintiffs replied *non tenure* and *riens in arriere*.

On the trial the defendant proved a counterpart of a lease in fee of certain premises, executed by the defendant as lessor and the plaintiffs as lessees, bearing date 1st April, 1818, reserving an annual rent of \$700, payable in equal portions on the first days of May and October in each year; in which lease was a *reservation* of all rents *then due or thereafter to become due*, on certain leases before then granted to three individuals, viz. A. Van Buren, W. Bissell, and B. Yale. By an indorsement on the lease dated 4th March, 1818, the four first payments of rent were each reduced \$100, and by a subsequent indorsement, dated 7th June, 1821, it was agreed that the deduction of \$100 should continue to be made upon the accruing rent. The plaintiffs produced and proved the lease in their possession, which contained a *reservation* of the *rents due* on the leases to Van Buren and others, at the date of the lease to the plaintiffs, but *not of the rents thereafter to become due*. Witnesses were examined on both sides as to the state of the lease and counterpart at the time of the execution of the same. in reference to the *variance* in relation to the accruing rent and as to the subsequent acts and declarations of the parties on the same subject. The plaintiffs also proved that after the execution of the lease to the plaintiffs, the defendant distrained property upon the premises demised to Van Buren, Bissell, and Yale, or some of them, for rent accrued upon those premises *subsequent* to the execution of the lease to the plaintiffs. This evidence was objected to as not amounting to an eviction; but if so, as inadmissible under the pleadings in the cause. It was received, subject to the opinion of this court.

The judge submitted to the jury the questions, whether the lease in Payn's possession had been *fraudulently altered*, and whether the defendant had distrained for rent accrued on the premises demised to Van Buren, Bissell, and Yale, *subsequent* to the execution of the lease to the plaintiffs. The jury found both questions against the defendant, and a verdict was accordingly entered for the plaintiffs, subject to the opinion of the court.

M. T. Reynolds, for the defendant.

D. Buel, Junior, for plaintiffs.

SAVAGE, C. J. When this cause was formerly before the court (8 Cowen, 71), we had occasion to consider the effect of a fraudulent alteration of a deed by a party to be benefited by it, and we then held that such alteration avoids the deed; but as in this case there were two leases executed, both of which were *originals*, we held that the fraudulent alteration of one deed did not avoid the other, and that the lessor therefore was entitled, as the case was then presented, to recover the rent due, if any remained unpaid; and a new trial was accordingly ordered, the jury having found for the plaintiffs.

Upon the new trial, the question whether a fraudulent alteration of one of the leases had been made was again submitted to the jury upon testimony on both sides, and has been again decided against the defendant. On the former trial we thought the jury would have been justified in finding a verdict either way upon that question. I am of the same opinion in relation to the last trial. The evidence is nearly balanced, but the jury have placed the most reliance upon the plaintiff's witnesses, or have considered the circumstances strongest against the defendant; and under such a state of facts the verdict ought not to be disturbed as contrary to evidence.

The principal questions now to be decided are, 1st. Whether under the pleadings the plaintiffs were at liberty to prove an *eviction* by the lessor of part of the premises? 2d. Whether proof of the lessor's distraining for the rents upon the leases to Van Buren and others was sufficient evidence of an eviction? and 3d. Whether such an eviction bars the landlord from recovering his rent?

1. As to the question upon the pleadings. The evidence clearly showed that there was a *holding* by the plaintiffs under the defendant, and that there was rent in arrear. The defendant is therefore entitled to judgment, unless under the plea of *riens in arriere*, the plaintiffs are at liberty to prove an eviction. It is said that if the plaintiffs have been evicted by the defendant, such an eviction has concluded the tenancy, and that consequently no rent can be in arrear. The general principle is, that anything may be given in evidence under the *general issue*, which shows that no right of action ever existed; and in some cases facts may be shown which prove that no right of action existed at the *commencement of the suit*, though it be conceded that a right of action had once existed. In the action of *debt* for rent, the defendant, under the plea of *nil debet*, may show an eviction by the plaintiff. 1 Mod. 35, 118; 1 Ld. Raym. 370; 1 Saund. 204, n. 2. But in an action of *covenant* for non-payment of rent, an eviction cannot be proved, unless pleaded. Probably the reason of the distinction is, that in the action of covenant there is, strictly speaking, no general issue. The plea of *non est factum* has been considered the general issue for the purpose of attaching to it a notice of special matter; but it puts in issue only the execution of the instrument declared on; it does not impose

upon the plaintiff the necessity of proving the breaches alleged. In the case of *Horn v. Lewin*, 1 Ld. Raym. 641 ; 12 Mod. 354, it is said by the court that *riens in arriere* is the general issue to an avowry. If an eviction may be shown in an action of debt for rent upon the plea of the general issue, I can see no reason why it may not in replevin upon the plea of the general issue to the avowry. Had there been a general issue in covenant, the same defence should, upon general principles, be received in that action upon the same plea. I am therefore of opinion that the plaintiffs were at liberty, under the pleadings, to show an eviction by the defendant of all or any part of the demised premises.

Where the lessor enters wrongfully into part of the demised premises, the tenant is discharged from the payment of the whole rent, till he be restored to the whole possession ; and this that no man may be encouraged to injure or disturb his tenant in his possession. 6 Bac. Abr. 49 ; Co. Lit. 148 b. If the lord or lessor disseises or ousts the tenant or lessee of any part, the whole rent is suspended as it is held in *Arcough's Case*, 9 Coke, 135. In *Dyett v. Pendleton*, 8 Cowen, 728, this principle is recognized and adopted as correct. In that case it was said that such a defence could be given in evidence under a plea of eviction only ; that, however, was an action of covenant, in which there is no general issue. In the case of *Watts v. Coffin*, 11 Johns. R. 499, it was said by Van Ness, Justice, that an eviction to produce an apportionment or a suspension of the rent, must be of part or the whole of the thing demised.

Did, then, the distress upon the lots held under the prior leases amount to an eviction? *Hunt v. Cope*, Cowp. 242, was an action of replevin in which the defendant avowed for rent, to which the plaintiff pleaded, 1. No rent in arrear ; and 2. That before the distress, the defendant (the lessor) unlawfully entered into a garden, part of the demised premises, and pulled down a summer-house. To this plea there was a demurrer and joinder, and judgment was given for the plaintiff (the tenant). But upon a writ of error to the King's Bench, the judgment was reversed ; and the only question argued was, whether the facts amounted to an eviction. Lord Mansfield said that the question turned upon the pleading ; that the rule of law was clear ; that to occasion a suspension of the rent, there must be an eviction or expulsion of the lessee, but this plea merely stated a trespass ; that the lessee should have pleaded an eviction, and then the facts which were stated might have been sufficient for the jury to have found a verdict in his favor. And in *Dyett v. Pendleton* it seems to be held that any obstruction by the landlord to the beneficial enjoyment of the demised premises, or a diminution of the consideration of the contract by the acts of the landlord, amounts to a constructive eviction. The acts of the landlord in this case are, distraining for rent due on the prior leases, after he had conveyed all his interest in them to the plaintiffs in this suit. This, under the decisions which have been made, amounts

to something more than a constructive eviction, and is sufficient to cause a suspension of the rent.

It is contended, however, that an ouster by the landlord which suspends the payment of the rent, must be not only an entry upon the demised premises (for instance, the act of distraining), but there must be a continuance in possession, so that the tenant is deprived of the occupancy; and that as the distress complained of took place before the accruing of the rent for which the distress was made, which is the foundation of the suit, the court are to presume that the tenants have subsequently had the full enjoyment of all the demised premises. In the absence of proof on that subject, the legal presumption is that the tenant, having been ousted of a part of the premises, continues out of possession; and such presumption can only be rebutted by evidence of their having been subsequently restored. But when it is recollected that the very gist of this action is, the right to the rents of which the defendants were ousted by the distress complained of, to presume a restoration of the premises, would be presuming contrary to the allegations of the defendant himself.

The defendant, therefore, is not entitled to recover any rent of the plaintiffs until he restores to them the entire possession of the premises demised, and the plaintiffs are entitled to judgment.

FOLTS v. HUNTLEY.

SUPREME COURT OF NEW YORK. 1831.

[Reported 7 Wend. 210.]

ERROR from the Onondaga Common Pleas. Folts sued Huntley in a justice's court, and declared in *covenant* on certain articles of agreement, bearing date 7th June, 1814, executed under seal by the parties, which, after reciting that Huntley, for the benefit of a saw-mill erected by him, had diverted the water of the Limestone Creek, along the bank thereof, *on the land of Folts*, proceeded as follows: "Now therefore, in consideration and upon condition of the payment of the rent herein-after mentioned, on (the part of) the said Huntley (to be paid), the said George Folts doth hereby for himself, his heirs and assigns, *lease and demise* to the said Timothy Huntley, his heirs and assigns, the use of the water in said creek, with so much of the bank as may be necessary to continue the diversion of the water as aforesaid, with the privilege of digging gravel in the bank of the said creek, for the purpose of repairing and improving his dam and water-works, *for such term of time*, and upon the express condition, that if he, the said Timothy Huntley, his heirs or assigns, shall pay, or cause to be paid to the said George Folts, his heirs or assigns, annually and every year, on the first day of

March, the sum of six dollars, from and after the first day of March, 1813; and shall also, for the accommodation of the said Folts; his heirs and assigns, make and keep in repair a bridge across the said Huntley's upper flume, and a road from thence through the bank to the flat lands; and shall also keep in repair a good fence on the bank the whole length of the said race-way on the said Folt's land; and shall build his dam across the said creek against and at the place where the upper flume now stands, and shall not so build his dam as to raise the water more than two feet above low-water mark. And the said Timothy Huntley doth hereby, for himself, his heirs or assigns, covenant and agree to and with the said George Folts, his heirs and assigns, to pay the rent above reserved, to build," &c., *covenanting* to perform all and singular, the premises above specified on his part to be performed. The plaintiff's declaration was for breaches of the several covenants contained in the agreement above set forth. The defendant pleaded the general issue, and attached to his plea a notice of various matters intended to be given in evidence on the trial. The justice gave judgment for the plaintiff for \$13 damages, and the defendant appealed to the Common Pleas. On the trial in the Common Pleas, the plaintiff claimed to recover damages only for such breaches of the agreement as had happened since 1st March, 1828, and proved that since that time Huntley had not maintained the bridges, or kept the road and fences in repair specified in the agreement, and gave evidence of the amount of damages sustained by him by reason thereof. The *omissions* of Huntley were proved by his admissions; and in the same conversation he said that *the State* had taken away his water, and he did not consider himself under any obligation to keep the bridges, road and fences in repair; that the mill had run for two or three years after the Canal Commissioners took the water, but did not do much business, and that for two years it had not run at all. The plaintiff proved an admission of Huntley, that he had *sold his privilege* to the State, and proceeded to inquire as to the amount received by him, but the evidence was objected to, and overruled, and it subsequently appearing that the transfer made by Huntley was in *writing*, the court decided that the writing must be produced, and that the evidence of the admissions of a transfer must be excluded from the consideration of the jury. The plaintiff then offered in evidence a *copy of a receipt*, purporting to be signed by Huntley, certified by the *Deputy Comptroller* of the State, under the *seal of office* of the Comptroller, as being on file in the Comptroller's office, by which, under date of December 9, 1825, Huntley acknowledged the receipt of \$1,000 of one of the Canal Commissioners, in full for the water of the Limestone Creek, taken to feed the Erie Canal, whereby his saw-mill was deprived of water, and rendered useless. This evidence was objected to, and overruled. It appeared that the water of the Limestone Creek was in 1825 taken to feed the Erie Canal, above where Huntley was to take it, and that since the 1st March, 1828, his mill had been useless. The plaintiff having rested, the defendant moved for a nonsuit, on the

grounds, 1st. That the contract was *conditional*, and that when Huntley ceased to pay rent the contract was at an end; and 2d. That the water of the creek having been appropriated by the Canal Commissioners, the Statute under which it was thus taken disannulled the lease or agreement, and discharged Huntley from the performance of his covenants. The court sustained these objections, and nonsuited the plaintiff; judgment was entered for the defendant, and the plaintiff sued out his writ of error.

S. L. Edwards, for plaintiff in error.

J. Watson, for defendant in error.

BY THE COURT, NELSON, J. The first question in this case is whether the defendant could avoid the lease by refusing to fulfil the covenants; or, in other words, whether the performance of the covenants were at his option. The intention of the parties, to be gathered from a view of the whole agreement, the criterion by which to give a construction to any part, giving effect, if consistent and reasonable, to the whole (1 Selw. 339); and if there be any ambiguity, such construction must prevail as is most strong against the covenantor, for he might have expressed himself more clearly. The principle has been applied to the construction of leases. *Webb v. Dixon*, 9 East, 15.

Now yielding to the interpretation urged by the defendant, there would be no mutuality in the agreement, or consideration to the plaintiff, for the benefit would be all on one side, and the obligation on the other; and though this might not make a covenant void *ab initio*, *Shubricks v. Salmon*, 3 Burr. 1637; *Lowe v. Peers*, 4 Id. 2225, it will at least require strong and express provisions to induce the court to come to that conclusion. I have no doubt that it was the intention of both parties, as well from the subject-matter and nature of the agreement as from a reasonable sense of the words themselves, that each was to be bound. The agreement was inartificially drawn; but the true reading is, that Folts covenants to lease to Huntley the use of the waters in Limestone Creek, with so much of the bank, &c., for the time and upon the condition that Huntley pays the rent, keeps in repair bridges, &c.; and then follows an express covenant on the part of Huntley, his heirs, &c., to Folts, his heirs, &c., to pay the rent, build and keep in repair the bridges, &c.

The true construction of this agreement is given in the case of *Canfield v. Westcott*, 5 Cowen, 270, and the cases in the note (a), to wit, that on a failure to pay rent, or to build and keep in repair bridges, &c., on the part of the defendant, the plaintiff might consider the lease forfeited, and re-enter by action of ejectment, or waive the forfeiture and sue, as he has done here, upon the express covenant.

There can be no doubt the lease is a perpetual one. It is by Folts, his heirs, &c., to Huntley, his heirs and assigns, for such time as he shall pay the rent and fulfil other stipulations. So long, then, as Huntley, his heirs or assigns, pay the rent and comply with these stipulations, they are entitled to all the rights and privileges under it; and we

have shown that Folts can enforce the payment of rent, &c., upon the *express covenant* of Huntley, and that it is not at the election of the latter to put an end to it. It therefore necessarily follows that the lease continues until put an end to by the mutual agreement of the parties to it, or till the plaintiff may elect to claim a forfeiture in the default of the lessee to pay, &c.

In the next place, it is contended that the diversion of the Limestone Creek by the Canal Commissioners, to be used as a feeder to the Erie Canal, being under the authority of law, is to be considered in the nature of an eviction by paramount title, and therefore a bar to the suit for rent, or for the breach of any other covenant; and so the court below decided. The term *demised* in the lease undoubtedly implied a covenant of quiet enjoyment, at least during the life of the lessor (Woodfall, 248; Shep. T. 160); and eviction under a superior and lawful title of the whole or any part of the demised premises, would constitute a valid defence. 1 Selw. 390; Cro. Eliz. 214; Johns. Dig. 440, tit. Covenant (c); *Pendleton v. Dyett*, 4 Cowen, 581. It is obvious, however, for many reasons, that this act of the Canal Commissioners, though lawful, is not an *eviction* within the meaning or spirit of the term, and can afford no defence to this suit. It was not inconsistent with, but entirely independent of a perfect right and title in the plaintiff to lease the demised premises, and rested upon great public considerations, paramount to all and every title to the property. Nor is the reason upon which this defence is founded applicable, to wit, that rents shall not be paid after the premises demised are gone. It is a fundamental principle that private property cannot be appropriated to public purposes without a just compensation; and accordingly the Statute empowering the Commissioners or their agents "to enter upon and use all and singular any lands, waters, and streams necessary for the prosecution of the improvement," &c., provided compensation for any injury produced to any individual by the exercise of this power. If the defendant has not already obtained his remuneration (which he probably has), the law affords him a perfect remedy, to the extent of the injury which his property has sustained by the diversion of the stream; he, and not the plaintiff, can pursue it. On another ground, it is not in the power even of the Legislature to impeach or disannul the covenants in this case. *Sturges v. Crowninshield*, 4 Wheaton, 122, 192, 209; *Mather v. Bush*, 16 Johns. R. 233.

*Judgment reversed, and venire de novo awarded.*¹

¹ See accord. *Parks v. Boston*, 15 Pick. 198 (1834); *Foot v. Cincinnati*, 11 Ohio, 408 (1842); contra, *Kingsland v. Clark*, 24 Mo. 24 (1856).

LAWRENCE v. FRENCH.

SUPREME COURT OF NEW YORK. 1841.

[Reported 25 Wend. 443.]

THIS was an action of replevin, tried at the Albany Circuit in June, 1839, before the *Hon. John P. Cushman*, one of the circuit judges.

The plaintiff, on 12th December, 1835, took a lease of the defendant of a building in the city of Albany called the Exchange Coffee-House, for the term of one year from the first day of May, 1836, at an annual rent of \$1,050, payable quarterly. He had, since May, 1834, been in possession of the whole of the premises demised, *except one room* in the corner of the building, which was occupied by one Candy. On the first day of May, 1836, Candy, under a prior lease from the defendant, at an annual rent of \$400, continued in the occupation of the room; and the plaintiff continued to occupy all the residue of the building, until 17th January, 1837; when the defendant issued a distress warrant, claiming \$487.50, to be due to him from the plaintiff for *three quarters' rent*, estimating the rent by deducting \$400 from the *annual rent reserved* in the lease to the plaintiff; thus charging the plaintiff with an *annual rent* of only \$650, for *three fourths* of which sum the warrant was issued. The property of the plaintiff was distrained to the amount of \$487.50; and the plaintiff sued out a writ of replevin. It was conceded by the plaintiff that \$650 *per annum* was a fair price for the *use of that portion* of the premises occupied by him; but he insisted that the defendant, not having put him into possession of the *whole* of the demised premises, had no authority by law to *distrain* for the rent reserved, or any part thereof; and so requested the judge to charge the jury. The judge refused so to charge; and on the contrary, instructed the jury that the defendant had a lawful right to make the distress for the sum demanded, and was entitled to their verdict. The jury accordingly found a verdict for the defendant, with six cents damages and six cents costs; found the rent to be \$487.50, and the value of the property at the same sum; and assessed the damages of the defendant at \$10, for the detention of the property. The plaintiff having excepted to the charge of the judge, moved for a new trial.

S. Stevens, for the plaintiff.

J. Van Buren, for the [defendant].

By THE COURT, NELSON, C. J. It is a familiar rule of law, that if the landlord enter wrongfully upon, or prevent the tenant from the enjoyment of, a *part* of the demised premises, it suspends the whole rent until possession is restored. His title is founded upon this, that the land leased is enjoyed by the tenant during the term; if, therefore, he be

deprived of it, the obligation to pay ceases. The rule is otherwise where a *part* is recovered by title paramount to the lessor's; for, in that case, he is not so far considered in fault, as that it should deprive him of a return for the part remaining. The law, therefore, directs an apportionment of the rent, 6 Bacon's Abr. 44, tit. Rent, L.; Gilbert on Rents, 173; Comyn's Land. and Ten. 214-219; Bradby on Dist. 24-30. But as between lessor and lessee, an eviction from part by the former, or any person claiming through him, will operate a suspension of the whole, Comyn's Land. and Ten. 524; 2 Saund. Pl. and Ev. 630. There are some cases illustrating this principle to which I will refer.

A mere trespass, by the lessor, will not suspend the rent, as where he entered and destroyed a building, Cowp. 242; but where he railed off a part of the premises, the act had that effect, 3 Camp. 513. So where he gave notice to an under-tenant to quit, and he did accordingly, it was held to amount to an eviction, 1 Stark. R. 94; also in case of a demise to another after the tenant had left the premises, 5 Barn. & Cres. 332.

The case of *Ludwell v. Newman*, 6 T. R. 458, in principle comes near the present one. It was an action on a covenant of quiet enjoyment in a lease. The breach was, that the plaintiff could not obtain the possession; that he applied to the tenant to attorn, who refused; an action of ejectment was brought, and defeated by a previous lease of the defendant, given the month before; by reason of all which the plaintiff was prevented from enjoying the term, &c. The second count was like the first, except it omitted the application to attorn, and proceedings in ejectment. Defective pleas were put in to each count, to which there were demurrers. One objection taken to the pleas was this: they stated the plaintiff might lawfully have enjoyed during the first half year; when it appeared by the declaration, that he could not have entered at any time on account of the prior lease. The court held, that the defendant's covenant of quiet enjoyment meant a *legal entry and enjoyment*, without the permission of any other person; which could not take place on account of the prior subsisting lease granted to R. See Platt on Cov. 327. The case decides that the lessee is not bound to test his right of entry by suit, as the only legal evidence of a breach of the covenant; nor need he commit a trespass by an actual entry. Platt on Cov. 327; Hob. 12; 2 Bacon, 66, B.

In *Tomlinson v. Day*, 2 Brod. & Bing. 680, the defendant took a farm under an agreement, by which the plaintiff stipulated that he should enjoy the exclusive right of sporting over the manor in which the farm lay, and should occupy the glebe land of the parish; rent, £450. The agreement, though acknowledged and recognized by the defendant, had never been signed by him; but he *occupied the farm* for some time. The chief inducement in taking it was the privilege of sporting; but it turned out the plaintiff had no power to grant the privilege, and the defendant was in fact warned off by the occupiers of the manor. Neither did he get possession of the glebe. In an action for use and occupation, the court held that an eviction of a part of the

subject-matter of the demise had been proved, and allowed a recovery for no more than the annual value of the farm. Though the rule for a time seems to have been inflexible, that in these cases the whole rent should be suspended till possession was restored, the last case referred to shows that if the tenant occupies part, he may be charged for such occupation upon a *quantum meruit*.

In *Smith v. Ruleigh*, 3 Camp. 518, 514, n., the defendant had agreed to take the premises at an entire rent, and possession was delivered; after which the plaintiff railed off a part of the garden, and the defendant thereupon returned the key. Lord Ellenborough held, that this amounted to an eviction from part of the demised premises, and a complete answer to the action. This case was afterwards recognized by Dallas, J., in *Stokes v. Cooper*, in which the rule was laid down, that after an eviction from part, the lessor cannot recover upon the original contract; and the tenant, by giving up possession of the residue, is entirely discharged; but if after the eviction he continues, he shall be liable on a *quantum meruit*. Comyn's Land. and Ten. 217, 452; 15 Mass. R. 268.

The result of all these cases, I think, shows that the defendant here has deprived himself of the remedy by distress. The eviction from part of the demised premises, by means of his prior lease, defeated the contract; and though the tenant is still liable by reason of his occupation of the residue, the holding is not strictly under the original agreement, but an implied obligation arises to pay the worth of them at the times specified therein. No fixed rent is due, and therefore distress is not the appropriate remedy. It would be unjust to allow it here, as the party himself has put it out of the power of the tenant to tender the amount. His rights will be sufficiently protected by allowing the usual redress, where no specific rent has been agreed on. 5 Barn. & Ald. 322.

New trial granted.

OGILVIE v. HULL.

SUPREME COURT OF NEW YORK. 1848.

[Reported 5 Hill, 52.]

ERROR to the New York Common Pleas, where Ogilvie sued W. and J. C. Hull, in debt, to recover the last year's rent claimed to be due upon a lease of a store in the city of New York. The lease was executed by one Brantingham to the defendants for the term of seven years from May 1st, 1834, and contained a covenant by the lessees to pay an annual rent of \$700. In the month of March, 1835, the lease was assigned to the plaintiff, and he took a conveyance in fee of the demised premises.

The defence was, an eviction by the plaintiff. The evidence in respect to the eviction was substantially as follows: During the years

ending in 1838, 1839, and 1840, one Utter occupied the premises as tenant of the defendants; and, on the 1st of February, 1840, the plaintiff called on Utter to ascertain if he desired to continue in the occupation of the store for another year. Utter informed him that he did, and, in reply to an inquiry of the plaintiff, said he was willing to pay \$600 rent. The plaintiff refused this proposition, and soon after posted a bill on the store announcing that it was "to let." Some three weeks afterwards the plaintiff again called on Utter, and offered to let him have the store for \$700 and taxes. Utter was dissatisfied with the price, and the negotiation between him and the plaintiff ceased. About a week before Utter's term expired, the plaintiff told him that, on looking over his papers, he found the defendants' lease did not expire till May, 1841, and that he had therefore nothing to do with the store. This information was immediately communicated by Utter to a clerk of the defendants, but not at the plaintiff's request. It further appeared that, in February, 1839, Utter was told by one of the defendants' clerks that the lease in question expired on the 1st of May, 1840; and from such information, in connection with the plaintiff's subsequent acts, Utter was induced to believe that the plaintiff had control of the premises, and therefore did not apply to the defendants for a new lease. Before he was advised of his mistake he had rented another store. It did not appear that the defendants attempted to rent the store for the last year, or that they took any interest in the matter. The court, in charging the jury, submitted to them whether the acts of the plaintiff, between February and May, 1840, did not amount to a constructive eviction. They remarked that, if the plaintiff entered upon the premises with intent to exercise his control as landlord, and had done so, it might amount to a constructive eviction, although the tenant in possession held under the defendants and had paid rent to them up to the 1st of May. They added, that, if the landlord interfered with the defendants' tenant, or the demised premises, in such a manner as to cause the tenant to move away, and by reason thereof the premises remained vacant for the following year, it would amount to a constructive eviction. The plaintiff's counsel excepted to the charge, and the jury rendered a verdict for the defendants. After judgment, the plaintiff sued out a writ of error.

J. M. Martin, for the plaintiff in error.

W. C. Wetmore, for the defendant in error.

By THE COURT, NELSON, C. J. No case, I apprehend, has carried the doctrine of constructive eviction to the extent laid down by the court below. The most that can be made out of the facts are these: The landlord (wilfully, if you please, though it was evidently through mistake) undertook to let the premises himself, before the expiration of the lease to the defendants and at the usual time for leasing in the city, by negotiating with the sub-tenant; and, on failing to agree with him, posted a bill on the premises, which continued till some short time before the year expired, when he abandoned all further interference. There was no inter-

ference by the landlord, or by any one claiming under him, with the *actual* use or occupation of the premises. The lessees had the undisturbed possession by their sub-tenant, until his term expired, and they might have had it till the expiration of their lease. The only ground for saying there has been an eviction, is the possible injury to the defendants, arising out of the mistaken or ill-advised interference of the plaintiff in the several attempts to lease the premises himself. This may, indirectly and remotely, have embarrassed the letting by the defendants, though it does not appear in the case that they interested themselves in any manner with a view to re-letting, or that they complained of or protested against the conduct of the plaintiff in the matter. They appear to have been perfectly passive and silent throughout.

Now, no general principle is better settled or more uniformly adhered to than that there must be an entry and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession depriving the tenant of the beneficial enjoyment of the demised premises, to operate a suspension or extinguishment of the rent. The cases are collected and well considered by Mr. Justice Kennedy in *Bennett v. Bittle and Another*, 4 Rawle, 339, and they establish the proposition stated beyond all manner of doubt. It would be a work of supererogation to go over them again, after the full and satisfactory review there taken. *Dyett v. Pendleton*, 8 Cowen, 727, decided in the Court for the Correction of Errors, shows only an application of the doctrine to an extreme case. That adjudication is not to be regarded as introducing a new principle, nor as establishing an exception to the general rule. There, the grossly lewd and immoral conduct of the landlord in the adjoining premises (another part of the same dwelling) was so offensive to common decency, and accompanied with such riotous and outrageous disturbances, as effectually to destroy the quiet occupation and beneficial enjoyment of the demised tenement, and render it uninhabitable by respectable people. This was considered such a disturbance and destruction of the reasonable use and occupation of the premises, as amounted to a virtual expulsion of the tenant.

I admit, a wrong may have been committed in this case against the lessees, by interfering with the right of renting the demised premises, which belonged exclusively to themselves; but I am unable to see how it can be said, within any rule of law that has ever been established, that here has been such an invasion of their possession and enjoyment as will bar an action for the rent. Slander of their title by the landlord would embarrass and prejudice the letting; but no one would think of attaching to it the consequences contended for in this case. The law has provided a different remedy. So of a trespass committed upon the premises by the landlord. *Bennett v. Bittle and Another*, 4 Rawle, 339; *Lawrence v. French*, 25 Wend. 443, 445.

The case of *Burns v. Phelps*, 1 Stark R. 94, is much relied on by the defendants; but the decision there made must be confined to the facts upon which it was founded. It might have applied here, if the sub-

tenant had quit during his term and left the store vacant, in consequence of any threats or improper interference of the landlord. The latter would not be permitted to recover rent from his lessees for the remaining unexpired term of the sub-tenant, whom he had virtually expelled from the premises. In this case there was no attempt to disturb him during his term. He left at the expiration of it because he could not agree about the rent for the next year. He never sought to lease again of the lessees, nor did they endeavor to lease to him. They must have known, or should have known, that they had the control of the store; and, for aught that appears in the case, they might have rented to Utter for the ensuing year, had they taken any steps for that purpose. The failure is owing more to their own remissness and neglect, than to the interference of the plaintiff.

Judgment reversed.

MORSE v. GODDARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1847.

[Reported 13 Met. 177.]

THIS was an action of debt, brought to recover five dollars, the amount of one month's rent of a tenement. At the trial in the Court of Common Pleas, before *Washburn, J.*, on appeal from a justice of the peace, the plaintiff put into the case a lease, made by him to the defendant, dated January 6th, 1846, of a certain tenement, for one year, reserving rent in monthly payments, and stated that the action was brought for the rent of the month ending April 6th, 1846. The defendant admitted that he entered into the tenement, under the lease, and that he was still in possession. But he proposed to show, in defence, that in February, 1846, W. M. Benedict and P. Merrick, being the owners of the tenement, entered into the same, and required the defendant to pay rent to them, and that he, in order to prevent being expelled therefrom, agreed to pay rent to them, after that time. The plaintiff objected to the competency of such evidence; but the court ruled that it was admissible. Thereupon the defendant introduced evidence tending to show that, on the 21st of February, 1846, the attorney of said Benedict and Merrick (in company with two witnesses) met the plaintiff in the street, and informed him that he was going to take possession of that part of the house in which the defendant lived; that said attorney and two witnesses went to the house, and went into the part occupied by the defendant, and told him they had come to turn him out unless he would agree to attorn, and become the tenant of said Benedict and Merrick, and pay rent to them; that the defendant yielded, and agreed so to pay rent; that they went from the house, and found the plaintiff, and told him what had been

done, and what the defendant had agreed to do. It did not appear that any evidence was shown to the defendant, at that time, of any title in Benedict and Merrick. In order to prove their title at the trial, the defendant introduced sundry deeds, and other evidence. See *Benedict v. Morse*, 10 Met. 223.

The judge instructed the jury, that if the defendant *bona fide* yielded possession of the premises to Benedict and Merrick, to prevent being actually expelled, and the plaintiff then had notice of this; and if the defendant had satisfactorily proved that Benedict and Merrick owned the estate by a good title, and had a right to take immediate possession, at the time when they undertook to turn the defendant out of possession — their title and possession being adverse to those of the defendant and his lessor — such yielding of possession was equivalent to an actual ouster, and was competent evidence in defence to the plaintiff's claim, sued in this action, for rent accruing after such yielding of possession; the burden of proof being upon the defendant.

The jury returned a verdict for the defendant, and the plaintiff excepted to the judge's instructions.

Bridges, for the plaintiff.

Randall and *Hartshorn*, for the defendant.

SHAW, C. J. In a justice action of debt for a month's rent, the defence was, that the defendant had been ousted, by persons having a paramount title, before the commencement of the time for which the rent was claimed.

The defendant offered evidence to show, that persons having a valid title, paramount to that of the defendant and his lessor, the plaintiff, and having an immediate right of entry, and of possession under it, made an actual entry on the premises, and required the defendant to pay rent to them from the time of such entry, or quit the premises. But it is objected to this defence, that a tenant cannot contest the title of his lessor, nor set up a paramount adverse title in a third person. And we think it well settled, that a lessee, taking the estate of his lessor, and entering into possession under it, admits his title, and is estopped from denying that title; or, what is in effect the same thing, is estopped from setting up an outstanding title in a third person. *Doe v. Smythe*, 4 M. & S. 347; *Doe v. Mills*, 2 Adolph. & Ellis, 17. But this is not inconsistent with another rule, that where there is an eviction or ouster of the lessee, by a title paramount, which he cannot resist, it is a good bar to the demand for rent, on the plain ground of equity, that the enjoyment of the estate is the consideration for the covenant to pay rent, and when the lessee is deprived of the benefit, he cannot be held to pay the compensation. Bac. Ab. Rent, L. Cruise's Dig. tit. 28, c. 3. It is not enough, therefore, that a third party has a paramount title; but, to excuse the payment of rent, the defendant must have been ousted or evicted under that title. *Hunt v. Cope*, Cowp. 242; *Pendleton v. Dyett*, 4 Cow. 581.

But an eviction under a judgment of law is not necessary. An

actual entry, by one having a paramount title and present right of entry, is an ouster of the tenant. He cannot lawfully hold against the title of such party. He is not bound to hold unlawfully, and subject himself to an action, and is not, therefore, compellable to resist such entry. *Hamilton v. Cutts*, 4 Mass. 349. So, when an execution creditor is put into possession by the sheriff, under the levy of an execution, he has the actual and exclusive possession, and may maintain trespass. *Gore v. Brazier*, 3 Mass. 523.

There is a recent case, which seems to us alike in principle. *Smith v. Shepard*, 15 Pick. 147. A mortgagor in possession made a lease for years, reserving rent. Afterwards, the mortgagee, having a paramount title, entered, as he lawfully might, with right to take the rents and profits. In a suit by lessor against lessee for rent, such entry under a paramount title was held to be an ouster, and a good bar to the action.

It is to be understood, that when a tenant thus relies on an ouster *in pais*, without judgment, he has the burden of proving the validity of the elder title, the actual entry under it, and that he acted in good faith, and without collusion with the party entering.

The instruction to the jury was, that if the defendant, *bona fide*, had yielded possession of the premises to Benedict and Merrick, to prevent being actually expelled; that the plaintiff had notice of this; and that, upon the evidence, Benedict and Merrick had a good title, paramount to that of the defendant and his lessor, and the right of immediate possession; their entry was equivalent to an actual ouster, and was a good defence to the action for rent. This direction, we think, was right; and the jury, by returning a verdict for the defendant, affirmed these facts.

Exceptions overruled.

CHRISTOPHER v. AUSTIN.

COURT OF APPEALS OF NEW YORK. 1854.

[Reported 11 N. Y. 216.]

APPEAL from a judgment of the New York Common Pleas. The action was brought by Thomas Vermilya in that court to recover for the use and occupation of a dwelling-house and three lots of ground from the 1st of May, 1847, to the 1st of May, 1848. The cause was tried before Judge *Woodruff*, without a jury. He found "that the defendant, by agreement not under seal, hired from the plaintiff the demised premises, from the 1st of May, 1847, to the 1st of May, 1848, at the rent of two hundred dollars, payable quarterly, and entered into the possession thereof under the agreement; that afterwards, and before any rent became payable, the plaintiff entered upon the demised premises and evicted the defendant from a part thereof, which eviction

continued during the whole residue of the term; that notwithstanding such eviction, the defendant voluntarily continued to enjoy, use and occupy the residue of the premises until the expiration of the term on the first of May, 1848; that after the first of February, 1848, the plaintiff prosecuted the defendant in an action of assumpsit upon the agreement, to recover the three quarters' rent, due on that day; in such action the defendant interposed as a defence the eviction of him by the plaintiff from a part of the demised premises, and upon trial of this issue a verdict was rendered in favor of the defendant, upon which judgment was entered." The judge decided as matter of law upon said facts, that such wrongful eviction of the defendant from a part of the premises, suspended the rent, and that the plaintiff could not recover for the use and enjoyment of the residue of the premises while such eviction continued; and therefore, whether the record and judgment in the former action were or not a bar to a recovery for the use and occupation from May 1st, 1847, to February 1st, 1848, that the eviction having continued during the whole term, this action for a compensation for the use and occupation of the residue of the premises, could not be sustained; and directed judgment in favor of the defendant. On an appeal by the plaintiff, the Court of Common Pleas, at General Term, affirmed the judgment. The plaintiff appealed to this court.

During the pendency of the suit, Vermilya, the plaintiff, died, and the suit was continued in the name of Christopher, his executor.

A. S. Garr, for the appellant.

M. G. Harrington, for the respondent.

PARKER, J. The judge found the fact that after the leasing of the premises for one year, viz., from the first day of May, 1847, to the 1st of May, 1848, by a written lease, not under seal, at a rent of \$200, payable quarterly, and after the defendant had entered into possession under such agreement, before any rent had become payable, the plaintiff entered upon the premises and evicted the said tenant from a part thereof, which eviction continued during the whole residue of the term of the hiring.

It is contended by the plaintiff's counsel, that although such an eviction would be a bar to an action on the agreement to pay rent, yet that it is no bar to an action under the Statute to recover a reasonable sum for the use and occupation, if the tenant continue to occupy a portion of the premises after such eviction from a part. There is no reason for such a distinction, nor can it be sustained by authority. The rule is, that if the landlord enter wrongfully upon or prevent the tenant from the enjoyment of a part of the demised premises, the whole rent is suspended till the possession is restored. *The Fitchburg Corporation v. Melven*, 15 Mass. R. 268. Nelson, C. J., said in *Lawrence v. French*, 25 Wend. 445, "his (the landlord's) title is founded upon this, that the land leased is enjoyed by the tenant during the term: if, therefore, he be deprived of it, the obligation to pay

ceases." And Spencer, Senator, in *Dyett v. Pendleton*, 8 Cowen, 731, states as the reason for the rule, "as to the part retained, this is deemed such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the payment of any rent." It would be a palpable evasion of the rule and of the penalty the law imposes upon the landlord for a wrongful eviction, to hold that he may recover for use and occupation on a *quantum meruit*, when he is not permitted to recover on the agreement itself.

The exception to the rule is where a part is recovered by title paramount to the lessor's; for in that case he is not so far considered in fault, as that it should deprive him of a return for the part remaining. *Lawrence v. French*, 25 Wend. 445; 8 Bac. Abr. 514, tit. Rent, L.; Gilbert on Rents, 173. And where the tenant enters, but is prevented from obtaining the whole of the premises, by a person holding a part under a *prior lease* executed by the landlord, it has been placed upon the same footing as an eviction by title paramount, and the landlord has been permitted to recover for use and occupation on a *quantum meruit*. *Lawrence v. French*, 25 Wend. 443; *Ludwell v. Newman*, 6 Term R. 458; *Tomlinson v. Day*, 2 Brod. & Bing. 680.

I know the rule has been laid down in some of the elementary books, Story on Cont. § 657; Taylor, Lan. & Ten. 443, to be that when the rent is entire and the landlord evicts the tenant during his term out of part of the premises, he may abandon the residue, and is not chargeable for the occupation of any part; but that if the tenant still continue to occupy the residue, he is chargeable upon a *quantum meruit*. The rule has been thus stated on the authority of two *nisi prius* cases, viz.: *Smith v. Raleigh*, 3 Camp. 518, and *Stokes v. Cooper*, a case not reported but referred to in a note to the same case, as having been decided by Dallas, J., at the Worcester Lent Assizes. In *Smith v. Raleigh* it appeared the tenant abandoned the premises after being evicted from a part, but the decision was not put by Lord Ellenborough on that ground, and I think the tenant would equally have been entitled to judgment, if he had remained in possession of the residue. The only case that can be found favoring the idea that a tenant who remains in possession of the residue during the term, after an eviction from part, is chargeable, is that of *Stokes v. Cooper*, above cited. And that is not sufficiently reported to enable us to know what were the facts of the case; and if it were so, it would be entitled only to the weight due to a hastily made decision at the circuit. If the decision was what it is claimed to have been, it is at war with the rule of law as it has been generally stated in well-considered cases. The consequence of an eviction from part is not merely a discharge of the tenant from the rent, provided he abandons the residue, but it is a discharge of the tenant from any rent or liability for the occupation of the residue during the term of hiring. In *Dyett v. Pendleton*, 8 Cowen, 731, Spencer, Senator, said: "This distinction, which is as per-

fectly well settled as any to be found in the books, establishes the great principle that a tenant shall not be required to pay rent, *even for the part of the premises which he retains*, if he has been evicted from the other part by the landlord;” and the rule as recognized in other cases and generally stated in the treatises is, that an eviction from part will operate as a suspension of the whole. 24 Wend. 445; Comyn’s Land. & Ten. 524; 2 Saund. Pl. & Ev. 630.

I suppose it is the right of the tenant under such circumstances to remain in possession of the residue during the term, and that he can neither be made liable on the original lease nor in an action for use and occupation, unless he holds over after the expiration of his term.

If I am right in this conclusion, the wrongful eviction of the defendant was a bar to the plaintiff’s right of recovery for the use of the premises in any form, and it is not necessary to consider whether, or to what extent, the litigation of the same subject-matter or of three fourths of it at least, in the former action, would have constituted a good defence.

There are no questions properly before us for examination, except those presented by the bill of exceptions. We cannot review the decision of the court below, on the motion to set aside the judgment, on the grounds of surprise and irregularity. These were matters of discretion, and did not involve the merits. I think the judgment of the court below should be affirmed.

GARDINER, C. J., also delivered an opinion in favor of affirmance.

Judgment affirmed.

EDGERTON v. PAGE.

COURT OF APPEALS OF NEW YORK. 1859.

[Reported 20 N. Y. 281.]

APPEAL from the Common Pleas of the city and county of New York. Action to recover one quarter’s rent of the first floor of brick building No. 8 Fulton Street in said city, for the quarter ending May 1st, 1855, leased by the plaintiff to the defendant for one year from May 1st, 1854, at a yearly rent of \$1,500, payable quarterly on the first days of August, November, February, and May. The defendant in his answer set out a copy of the lease, by which it appeared that the defendant was to have the privilege of renewal for one year at the same rent. The answer alleged that this privilege was one of the main inducements on the part of the defendant to the taking of the lease, and one of the principal causes of its value. The answer further alleged that the plaintiff, between the first days of February and May, 1855, was the occupant of the entire upper part of the building in question, and also of the adjoining building; that between those days, and while the defendant occupied

the demised premises, the plaintiff wantonly, maliciously, and negligently permitted certain water-pipes, coming down through the rear of the building and communicating with a sewer under the demised premises, and which pipes were used for carrying off the waste water from the upper stories of the building, to get out of order and leak; that the plaintiff, knowing this, maliciously and negligently permitted large quantities of water and filth to flow through the pipes, which leaked therefrom into the demised premises, injuring the property of the defendant, deposited therein, to the amount of \$390, interfering with and depriving the defendant of the beneficial enjoyment of the premises; that the plaintiff could, by ordinary care and prudence, have prevented the injury, and that the defendant requested the plaintiff to repair the pipes or abstain from their use, which he neglected to do; that the defendant was injured to the amount of \$250 in the prosecution of his business during the quarter in question. The answer further alleged, that at divers times during the quarter in question, large quantities of water, filthy and otherwise, were thrown out by the plaintiff and his servants, from the rear windows of the portion of the building occupied by the plaintiff, so negligently and maliciously as to run into the demised premises, by which the defendant was injured to the amount of \$150; that the defendant was compelled, by the injuries, to abandon the possession of the premises on or about the 1st of May, 1855, thereby losing the benefit and being deprived of the privilege of renewal created by the lease which he intended to avail himself of but for said injuries. The answer insists upon the facts as a defence to the action, and also as a counter-claim. The plaintiff demurred to the answer and assigned several causes, among them that the facts did not constitute a defence nor a counter-claim available to the defendant in the action. The cause was heard at Special Term, and judgment given for the defendant upon the demurrer. The plaintiff appealed; the court at General Term reversed the judgment, and gave judgment for the plaintiff, from which the defendant appealed to this court.

John Graham, for the appellant.

Winchester Britton, for the respondent.

GROVER, J. The demurrer presents two questions: First, whether the facts alleged in the answer constitute a defence; second, whether they constitute a counter-claim, available to the defendant by way of recoupment or otherwise in this action. The rule has long been settled, that a wrongful eviction of the tenant by the landlord, from the whole or any part of the demised premises, before the rent becomes due, precludes a recovery thereof until the possession is restored. *Christopher v. Austin*, 1 Kern. 217. Whether this eviction must be actual by the forcible removal of the tenant by the landlord from the demised premises or a portion thereof, was not settled in this State until the case of *Dyett v. Pendleton*, 8 Cow. 728. In that case, the principle was established by the Court for the Correction of Errors, that when the lessor created a nuisance in the vicinity of the demised premises, or was guilty of acts

that precluded the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandoned the possession before the rent became due, the lessor's action for the recovery of the rent was barred, although the lessor had not forcibly turned the tenant out of possession. Ever since that case, this has been considered as a settled rule of law binding upon all the courts of the State. Such act of the lessor, accompanied by an abandonment of possession by the lessee, is deemed a virtual expulsion of the tenant, and, equally with an actual expulsion, bars the recovery of rent. The reason of the rule is, that the tenant has been deprived of the enjoyment of the demised premises by the wrongful act of the landlord; and thus the consideration of his agreement to pay rent has failed. In case of eviction from a portion of the premises, the law will not apportion the rent in favor of the wrong-doer.

In this case, the answer shows that the defendant continued to occupy the premises for the whole time for which the rent demanded accrued. In this, the case differs from *Dyett v. Pendleton*, *supra*. I cannot see upon what principle the landlord should be absolutely barred from a recovery of rent, when his wrongful acts stop short of depriving the tenant of the possession of any portion of the premises. The injury inflicted may be to an amount much larger than the whole rent, or it may be of a trifling character. In all the cases where it has been held that the rent was extinguished or suspended, the tenant has been deprived, in whole or in part, of the possession by the wrongful act of the landlord, either actually or constructively. There is no authority extending the rule beyond this class of cases. It would be grossly unjust to permit a tenant to continue in the possession of the premises, and shield himself from the payment of rent by reason of the wrongful acts of the landlord impairing the value of the use of the premises to a much smaller amount than the rent. This must be the result of the rule claimed by the defendant. The moment it is conceded that the injury must be equal to the amount of the rent, the rule is destroyed. It would then only be a recoupment to the extent of the injury. In *Ogilvie v. Hull*, 5 Hill, 52, Nelson, C. J., in giving the opinion of the court, says: That no general principle is better settled, or more uniformly adhered to, than that there must be an entry and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession depriving the tenant of the beneficial enjoyment of the demised premises, to operate a suspension or extinguishment of the rent. The rule contended for by the defendant is a very different one, suspending or extinguishing the rent whenever the enjoyment, in consequence of the tortious acts of the lessor, becomes less beneficial than it otherwise would have been. The true rule, from all the authorities is, that while the tenant remains in possession of the entire premises demised, his obligation to pay rent continues.

The remaining question is whether a counter-claim, arising from the facts contained in the answer, is available to the defendant in this action.

By section 149 of the Code, the defendant is permitted to include in his answer new matter, constituting a counter-claim. Section 150 defines the class of demands which are embraced in section 149, as counter-claims. A counter-claim must be, 1st, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; or 2d, in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. The demand of the defendant, set out in the answer, does not arise out of the contract set forth in the complaint. That contract is for the payment of rent, upon a lease of the demised premises. The defendant's demands arise from the wrongful acts of the plaintiff in permitting water to leak and run into the premises, and in causing or permitting it to be thrown upon the premises and property of the defendant. These acts are entirely independent of the contract of leasing upon which the action is brought. The demands are not connected with the subject of the action; that is, the rent agreed to be paid for the use of the premises. The defendant's demands are for a series of injuries to his property deposited upon the premises, and for impairing the value of the possession. It would be a very liberal construction to hold that in an action for rent, injuries from trespasses committed by the lessor upon the demised premises might be interposed as a counter-claim. The acts of the plaintiff in this case are of a similar nature. They are either acts of trespass or negligence, from which the injuries to the defendant accrued. Such a construction could only be supported by the idea, that the subject of the action was the value of the use of the premises. But when there is an agreement as to the amount of rent, that value is immaterial. Unless the acts of the defendant amount to a breach of the contract of letting, they are not connected with the subject of the action. In the case of the *Mayor of New York v. Mabie*, 8 Kern. 151, it was held by this court that a covenant for quiet enjoyment by the lessor was implied in a lease under seal, for a term not exceeding three years, since as well as before the Revised Statutes; that this covenant was broken by an interference with possession by the lessor under a claim of right; consequently, that damages sustained from such acts might be recovered in an action for rent. It was remarked by Denio, J., in giving the opinion in that case, that it is not, however, every mere trespass by the lessor upon the demised premises which will amount to a breach of this covenant; although the covenantor cannot avail himself of the subterfuge, that his entry was unlawful, and he therefore a trespasser, to avoid the consequences of his own wrong, still, to support the action of covenant, the entry must be made under an assumption of title. For this, the learned judge cites *Platt on Covenants*, 319, 320. There is nothing in the answer in this case tending to show, that any of the acts of the defendant were done under any claim of right whatever. They did not therefore amount to a breach of the contract created by the lease, and the injuries sustained by the defendant do not therefore con-

stitute a counter-claim connected with the subject of the action. The judgment should be affirmed.

All the judges concurring,

*Judgment affirmed.*¹

LEISHMAN v. WHITE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[Reported 1 Allen, 489.]

CONTRACT. The first count was for use and occupation of a tenement hired of the plaintiff by the defendants. The second count was for one quarter's rent of the same tenement. Another count afterwards filed set forth a lease by the plaintiff to the defendants of a hotel in Medford, near Spot Pond, with the lands adjoining, and an island in the pond, for five years, at the yearly rent of two hundred and fifty dollars, payable quarterly. The answer, among other defences, set forth an eviction of the defendants by the lessor from a portion of the premises.

At the trial in the Superior Court, the defendants offered evidence to prove that the plaintiff had evicted the defendants from a portion of the premises; but *Vose, J.*, ruled that such eviction, if proved, would only bar the plaintiff's claim *pro tanto*, and that he might still recover a proportionate share of the rent, according to the ratable value of the portion of the premises from which the defendants were not evicted; and a verdict was accordingly returned for the plaintiff, and the defendants alleged exceptions.

C. M. Ellis, for the defendants.

A. V. Lynde, for the plaintiff.

BIGELOW, C. J. This action cannot be maintained if the defendant proves that he has been evicted from a part of the demised premises by the plaintiff. In such case, no recovery can be had on the covenant to pay rent, because the defendant has been deprived of the beneficial enjoyment of a portion of the estate by the tortious act of the lessor, and the covenant, being entire, cannot be severed or apportioned so as to allow the plaintiff to recover a part of the rent reserved by the lease. *Shumway v. Collins*, 6 Gray, 232.

Nor can an action for use and occupation of the premises be maintained against the defendant. The lease is not terminated by the unlawful eviction of the lessee. He still continues to occupy that part of the estate from which he has not been evicted, under and by virtue of the demise under seal. No implied promise arises to pay for such occupation and enjoyment. The case therefore stands thus: to the claim on the covenant, the answer is the eviction; to the demand for use and occupation, the answer is that the defendant holds under his lease; so that, in neither aspect of the case, can the plaintiff maintain his action. *Fuller v. Ruby*, 10 Gray, 285. *Verdict set aside.*

¹ See *Borel v. Lawton*, 90 N. Y. 293. But see *Alger v. Kennedy*, 49 Vt. 109.

McCLURG v. PRICE.

SUPREME COURT OF PENNSYLVANIA. 1868.

[Reported 59 Pa. 420.]

BEFORE THOMPSON, C. J., AGNEW, SHARSWOOD, and WILLIAMS, JJ.
READ, J., absent.

Error to the District Court of Allegheny county: No. 56, to October and November Term 1868.

This was an action of assumpsit, commenced March 26th, 1866, by W. T. McClurg against Mary C. Price and William H. Sims, trading as Price & Sims.

The first count of the declaration averred that the plaintiff, on the 15th day of April 1866, leased to the defendants a warehouse for seven and a half months, at the rate of \$1500 *per annum*, payable quarterly, the first quarter to be computed from April 1st.

The second count averred, that on the 20th of March the defendants were indebted to the plaintiff in the sum of \$900, for the use and occupation of a warehouse. The declaration contained also the common counts.

On the trial, before *Hampton*, P. J., the plaintiff gave evidence of the occupancy by the defendants of his warehouse and rested. The defendants then called W. C. Robertson, who testified: That a lease was agreed upon between the plaintiff and defendants for the warehouse in question at the annual rent of \$1500 *per annum* for the whole building, payable quarterly; the defendants were to get possession of all but the fourth and fifth stories on the 12th of May 1866, and of the fourth and fifth stories whenever they should want them. There were some old iron, &c., on the premises belonging to the plaintiff, which were to remain in the fourth and fifth stories till "the defendants needed those rooms." The defendants did not get possession of the cellar; it was "lumbered up" with old iron, &c., belonging to the plaintiff. The plaintiff sold the good-will as part of the consideration. Defendants had the privilege of renting for another year on the same terms. John Brisbin testified: The plaintiff occupied part of the second story, with ironware; the fourth and fifth stories were occupied entirely by him. The defendants frequently between May and August told the plaintiff that they wanted the fourth and fifth stories, and would not pay rent unless they got them; plaintiff passed off these requests in a careless way, — did not say much, and did not give possession of those stories; he was there generally every day from morning till evening; he sold some of his goods from the store during the time. The defendants abandoned the premises about the last of November, 1866, for want of room.

The plaintiff requested the court to charge the jury: —

"1. That merely leaving wares and rubbish in portions of the leased building would not be an eviction in law of the lessees, but they would have the right to remove said goods at the expense of the landlord, treating them as they might have done the property of third parties.

"2. That if the jury find from the evidence that the defendants continued in the enjoyment of the larger and more valuable portions of the building, after their alleged demand for possession of the fourth and fifth stories, such conduct is a waiver of any right to treat such possession by the plaintiff as an eviction; and defendants will be liable for a proper rent for the premises actually enjoyed by them."

The points were answered in the charge, and substantially denied.

The defendants asked the court to charge:—

"1. That the facts in evidence showed an eviction in law before any rent had fallen due.

"2. That having made a special contract for the rent of the entire building for a year, plaintiff cannot set that contract aside and bring this action for use and occupation, and recover rent for that part of the building occupied by defendants."

The court affirmed both these points.

The court, after stating the evidence to the jury, charged:—

"These facts, they contend, if proved to the satisfaction of the jury, will constitute a full and valid defence to the plaintiff's action, for the following reasons: 1. Because they constitute an eviction in law, before any rent had fallen due. But if this position be not sustained, then, 2. That the plaintiff refused, after request, to deliver them the entire possession of the demised premises, and as the plaintiff cannot take advantage of his own wrong in refusing to comply with his contract, by apportioning the rent, the law will not do so for him. 3. That having made a special contract for the rent of the entire building for a year, he cannot set that contract aside and bring this action for use and occupation, and recover rent for that part of the building occupied by the defendants.

[“If you find from the evidence that the contract, as testified to by Mr. Robertson, was entered into by the parties, and that the defendants entered into possession under the same; and that the plaintiff was repeatedly requested by them to give them the possession of the fourth and fifth stories, before any rent had fallen due; that he gave them no definite answer, but put them off from time to time, without any positive refusal, leaving them to infer that he would do so; and that they were finally compelled, for want of room to carry on their business, to rent another house, and moved out in the latter part of November; then we instruct you, that the plaintiff is not entitled to recover in this action for use and occupation for the time the defendants occupied a portion of the building, and your verdict ought to be for the defendants.]

“But if there was no such special contract, but the defendants entered merely with the consent of the plaintiff, then they are liable

to pay a fair rent for the use of such portions of the building as they occupied."

The verdict was for the defendants. The plaintiff removed the case to the Supreme Court, and assigned for error the disaffirmance of his points and the portion of the charge in brackets.

G. Shiras, Jr., for plaintiff in error.

D. Reed, for defendants in error.

The opinion of the court was delivered, January 4th, 1869, by

WILLIAMS, J. The plaintiff's retention of a part of the demised premises, and his refusal to deliver possession thereof to the defendants, on demand, in accordance with the terms of his verbal lease, did not constitute an eviction in law. It is doubtless true that there may be an eviction without an actual physical expulsion; but there can be no eviction, actual or constructive, without an antecedent possession. If this case turned on the question of eviction, the plaintiff might be entitled to recover rent for the portion of the premises actually enjoyed by the defendants. But it does not turn on this point. The evidence shows, and the jury have found, that the plaintiff leased his warehouse to the defendants, at an annual rent of \$1500, payable quarterly; that at the making of the contract, he delivered to them possession of the three lower stories, and agreed to give them possession of the cellar and of the fourth and fifth stories, on demand; that he refused to deliver possession thereof, although repeatedly requested; and that the defendants were finally compelled, for want of room, to abandon the premises and to rent another house for the transaction of their business.

Notwithstanding the plaintiff's deliberate and persistent refusal to perform his contract, he claims the right to recover compensation for the use and occupation of the portion of the demised premises actually enjoyed by the defendants, on the ground that they had the right to treat his goods as they would those of a stranger, and to remove them at his expense. But if the right be conceded, it does not follow that the defendants were bound to exercise it to the exclusion of all other remedies which the law gave them for the redress of the plaintiff's breach of his contract, or that their failure to exercise it will prevent them from setting up any defence to his claim for rent which they might otherwise make. But the defendants had no right to remove the plaintiff's goods. The law gave them no such remedy for his refusal to perform his contract. The evidence not only shows that his goods were in the portion of the demised premises which he withheld from the defendants, but that he was in the daily occupancy thereof for the purpose of selling his goods, and that he made sales from time to time, although part of the consideration of the stipulated rent was the good-will of his business. If the defendants had ejected the plaintiff and turned his goods into the street, or removed them elsewhere, they would have been guilty of a trespass for which his breach of the contract would have afforded them no justification. Nor was their continuance "in the enjoyment of the larger and more valuable portion of the building," after their demand

for possession of the residue and its refusal by the plaintiff, a waiver of any of their rights under the contract, or of any defence they might have to the plaintiff's demand for rent, arising from his breach of the contract.

The jury have found that when the defendants demanded possession of the residue of the demised premises, the plaintiff gave them no definite answer, but put them off from time to time, without any positive refusal, leaving them to infer that he would comply with their request. And if the jury had not so found, the plaintiff was bound to perform his contract, and is answerable for all the legal consequences of its breach, unless its performance was actually waived by the defendants. Their continuance in the possession of the three lower stories, after the plaintiff's refusal to deliver possession of the residue of the building, did not in itself amount to a waiver of their right to insist upon a strict performance of the contract. They had the undoubted right to retain possession of the three lower stories, and to hold the plaintiff responsible for his failure to deliver possession of the cellar and of the fourth and fifth stories, as required by his contract. The only question, then, under the facts of this case, is: Was the plaintiff entitled to recover any portion of the stipulated rent under the count for use and occupation? He leased his warehouse to the defendants for an entire consideration, and his contract must therefore be regarded as an entirety. If the consideration is single, the contract is entire, whatever the number or variety of the items embraced in its subject. The principle is too well settled to admit of doubt, and too familiar to require the citation of authorities in its support, that for the part performance of an entire contract there can be no recovery, unless complete performance has been prevented or waived by the party entitled to demand it.

If the plaintiff had performed his contract he might have recovered on the count for use and occupation, under the Statute of 11 Geo. II. c. 19, which is in force in this State (Rob. Dig. 237); but having failed to perform it, he was not entitled to recover, either upon a count on the contract of lease, or upon the statutory count for use and occupation.

The learned President Judge of the District Court was therefore clearly right in instructing the jury that, if they found the facts to be as stated in the charge, the plaintiff was not entitled to recover in this action for use and occupation for the time the defendants occupied a portion of the building, and their verdict must be for the defendants.

Judgment affirmed.

ROYCE v. GUGGENHEIM.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1870.

[Reported 106 Mass. 201.]

CONTRACT for the rent from March 7 to April 7, 1869, of real estate leased by the plaintiff to the defendant for three years from September 7, 1868, by a lease, dated on that day, which described the demised premises as "the small wooden house and store, now occupied by said Guggenheim and numbered 117 on Eliot Street in Boston," and contained no express covenant on the part of the landlord.

At the trial in the Superior Court, before *Rockwell*, J., the defendant relied on his eviction from the premises, in defence against the action; and the plaintiff requested a ruling "that, in order to constitute an eviction, whether of a part, or of the whole of said premises, it must be as if closed up actual and entire, there being evidence of some use of the alleged evicted rooms." The judge declined so to rule; but instructed the jury "that if the plaintiff, before the month for which rent was sought to be recovered, had evicted the defendant from two or more of the rooms, he cannot recover for that month's rent; that if the rooms, at the time of the lease and for some time after, had light and air enough to make them fit for use as kitchen and sleeping-chamber, and were thus used, and if, after the erection by the plaintiff of the new building in the back yard, against the house, closing the windows of those rooms, those rooms were made entirely unfit for those purposes, and by reason of that unfitness were abandoned, and this erection was not by the license or consent of the defendant, this was an eviction so as to effect a suspension of the rent, and it was not essential to such eviction that the doors of the rooms should have been closed up by the plaintiff so as to prevent the defendant's entry into the same." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions. The bill of exceptions contained no statement of the evidence on the question of eviction, other than appears in the above statement of the instructions given or requested.

H. H. Mather, for the plaintiff.

J. L. Eldridge, for the defendant.

GRAY, J. The eviction of a tenant from the demised premises, either by the landlord or by title paramount, is a bar to any demand for rent, because it deprives him of the whole consideration for which rent was to be paid. *Gilbert on Rents*, 145; *Morse v. Goddard*, 13 Met. 177. And his eviction by the landlord from part of the premises suspends the entire rent, because the landlord "shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." *Hale*, C. J.,

in *Hodgkins v. Robson*, 1 Ventr. 276, 277; *Page v. Parr*, Style, 432; *Shumway v. Collins*, 6 Gray, 227; *Leishman v. White*, 1 Allen, 489.

To constitute an eviction which will operate as a suspension of rent, it is not necessary that there should be an actual physical expulsion of the tenant from any part of the premises. Any act of a permanent character, done by the landlord, or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or of a part thereof, to which he yields and abandons possession, may be treated as an eviction. *Smith v. Raleigh*, 3 Camp. 513; *Upton v. Townend*, 17 C. B. 30.

But no lawful act, done by the landlord upon an adjoining estate owned by him, for the purpose of improving that estate, and not for the purpose of depriving the tenant of the enjoyment of any part of the demised premises, can be deemed an eviction. The mere fact that by an act or default of the landlord, not unlawful in itself, nor accompanied with any intention to affect the enjoyment of the premises demised, they have been rendered uninhabitable, is not sufficient. It is now well settled, both here and in England, that in a lease of a building for a dwelling-house or store, no covenant is implied that it should be fit for occupation. *Hart v. Windsor*, 12 M. & W. 68; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, Ib. 242; *Welles v. Castles*, 3 Gray, 323. And the English authorities, ancient and modern, are conclusive, that even where the landlord is bound by custom or express covenant to repair, and by his failure to do so the premises become uninhabitable, or unfit for the purposes for which they were leased, the tenant has no right to quit the premises, or to refuse to pay rent according to his covenant, but his only remedy is by action for damages. 14 Hen. IV. 27, pl. 35; 27 Hen. VI. 10, pl. 6; Bro. Ab. Dette, 18, 72. Parke, B., in 12 M. & W. 84; *Surplice v. Farnsworth*, 7 Man. & Gr. 576; *Kramer v. Cook*, 7 Gray, 550; *Leavitt v. Fletcher*, 10 Allen, 119, 121.

In the recent English case of *Upton v. Townend*, 17 C. B. 30, after elaborate arguments upon the question, all the judges substantially agreed upon the definition of eviction. Chief Justice Jervis said: "I think it may now be taken to mean this: not a mere trespass and nothing more, but something of a grave and permanent character, done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." Mr. Justice Williams said: "There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises, which do not amount to an eviction, but which may be either mere acts of trespass, or eviction, according to the intention with which they are done. If these acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction." Mr. Justice Crowder said: "Eviction, properly so called, is a wrongful act of the landlord, which operates the expulsion or amotion of the tenant from the land. The question here is, whether there has been an eviction as it is popularly called, a putting out or depriving the

tenants of the subject-matter of the demise." And Mr. Justice Willes said: "If the plaintiff is liable for what has been done, does it amount to an eviction? I am of opinion that it does, as being an act, of a permanent character, done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised, or of a part of it." The act of the landlord which was there held, upon a statement authorizing the court to draw such inferences as a jury might, to amount to an eviction, was the rebuilding of the tenements upon their destruction by fire (which the lessor had covenanted to do) in such a manner as permanently to alter the character of the demised premises.

In a still later case, where the tenant, being desirous to underlet, put in a man to show the rooms, and posted in the window a bill stating that they were to be let; and the landlord, being annoyed by this proceeding and by the conduct of the man, turned him out of the house and took down the bill, but left the keys in the rooms; and the tenant did not return, and contended that he had been evicted, and therefore was not liable for the rent, — it was ruled at *nisi prius*, and affirmed by the Court of Queen's Bench upon a motion for a new trial, that it was a question for the jury, whether the act of the landlord was done with the intention of evicting the tenant, or simply for the purpose of expelling the man whom he had put in; and, the verdict being for the landlord, the court refused to set it aside. *Henderson v. Mears*, 1 Fost. & Finl. 636; a. c. 28 L. J. N. S. Q. B. 305; 5 Jur. N. S. 709; 7 Weekly Rep. 554.

It was argued for the defendant, in the present case, that even the erection of a building by the landlord upon adjoining land would be an eviction, if it stopped the tenant's windows; and his counsel cited *Dyett v. Pendleton*, 8 Cowen, 727, in which the New York Court of Errors held that the creation of a nuisance by the landlord in another tenement under the same roof, by bringing lewd women into it, who made a great noise and disturbance there at night, in consequence of which the lessee and his family left the demised premises, was evidence to go to the jury under a plea of eviction. Upon that case, it is to be observed, 1st. The act of the landlord was an unlawful act, and not a lawful use of his other tenement; 2d. The decision of the Court of Errors was not that the facts in law amounted to an eviction, but only that they should have been submitted to the jury; 3d. That decision reversed the unanimous judgment of the Supreme Court, as reported in 4 Cowen, 581; 4th. It has since been considered, even in New York, an extreme case. *Savage, C. J.*, in *Etheridge v. Osborn*, 12 Wend. 529, 532. *Nelson, C. J.*, in *Ogilvie v. Hull*, 5 Hill, 52, 54. *Bronson, C. J.*, in *Gilhooley v. Washington*, 4 Comst. 217, 219. In *Palmer v. Wetmore*, 2 Sandf. 316, the Superior Court of the city of New York, consisting of Chief Justice Oakley and Justices Vanderpool and Sandford, adjudged that the mere fact of the erection of a building by a landlord on his adjoining land, so as to obstruct and darken the tenant's windows, was not an eviction. To the same effect is *Myers v. Gemmel*, 10 Barb. 537. See also the

learned opinion of Judge Daly in *Edgerton v. Page*, 1 Hilton, 320; s. c. 20 N. Y. 281. We cannot, therefore, rest our judgment in the case at bar upon that of *Dyett v. Pendleton*. Nor is it necessary so to do.

The lease from the plaintiff to the defendant was of a house and shop, and contained no express covenant on the part of the landlord. By the law of this Commonwealth, no easement of light and air exists over adjoining lands unless by express grant or covenant. *Collier v. Pierce*, 7 Gray, 18; *Rogers v. Sawin*, 10 Gray, 376; *Brooks v. Reynolds*, 106 Mass. 31. If the plaintiff had conveyed away the adjoining estate, the grantee might have built thereon so as to stop up the defendant's windows, without affording the latter any right of action for damages, or of suspension or abatement of his rent. And so if the landlord himself erected a building upon any part of the adjoining estate, for the purpose of improving that estate, it was a lawful act, which violated no obligation which he was under to the defendant, and did not constitute an eviction. If, on the other hand, such an act was done by the landlord for the purpose and with the effect of making the defendant's tenement or any room therein uninhabitable, the defendant might perhaps at his election treat it as an eviction, and give up the premises and refuse to pay rent. At any rate he might do so, if the building was erected upon part of the curtilage included in his lease, closing the windows of his dwelling-house so as to make a part of it uninhabitable; because that would be the erection of a permanent structure on part of the demised premises, materially changing the character and beneficial enjoyment thereof; and in such case the landlord would be responsible for the effect of his wrongful act, without further proof of unlawful intent. *Upton v. Townend*, 17 C. B. 30, above cited.

Applying these principles to the bill of exceptions, we are of opinion that the plaintiff fails to show that he was aggrieved by the instructions given at the trial. Under those instructions, the jury must have found that by the plaintiff's erection of a new building in the back yard against the house, without the tenant's consent, two of the rooms therein, previously used as a kitchen and bedroom, were made untirely unfit for those purposes, and by reason of that unfitness were abandoned. The bill of exceptions does not show that the plaintiff contended that the rooms could have been used for any other purpose after the erection of the new building, or that the back yard was not part of the demised premises, or made any question, or asked for any ruling, as to the intention with which he erected that building.

*Exceptions overruled.*¹

¹ See *Sherman v. Williams*, 113 Mass. 481.

DE WITT v. PIERSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1873.

[Reported, 112 Mass. 8.]

CONTRACT to recover eleven weeks rent for the use and occupation of a teneament, hired of the plaintiff by the defendant, and by him actually occupied from the second of March, 1870, to May 18th, 1870, at six dollars a week.

At the trial in the Superior Court before *Scudder, J.*, there was no denial by the defendant that he occupied the premises during all the time sued for, nor of the correctness of the plaintiff's account, except as to the charge of rent for the first two weeks of the term, which he claimed had been paid, and which was allowed by the jury in their verdict. For the defence, it was shown that the premises, for the use of which rent was claimed, were two rooms situated in a house on Harrison Avenue, in the city of Boston; that during the entire portion of the term declared for, other rooms in the same house directly beneath those occupied by the defendant were leased by the plaintiff to one Mrs. Fletcher, whom one of the witnesses for the defence, formerly a policeman, testified was a person of notoriously bad character; that this woman introduced into the apartments hired by her two other women as lodgers, whom the same witness testified were notoriously of lewd character. One of the witnesses for the defence thought the apartments let to this person were used for the purpose of prostitution, and he testified that, on two occasions, drunken men were seen in their rooms; that the policeman on duty in that section of the city, on several occasions, drove away a crowd of boys who were attracted to the spot by the noise and riot proceeding from the rooms occupied by these women; and the defendant testified that the disturbance caused by the singing of bawdy songs, and the loud talking of the women and their visitors, and the frequent ringing of the door-bell, were a constant source of annoyance to the family of the defendant, which consisted of himself and his wife; that notice of the fact that the defendant was annoyed and disturbed by these things, and of the character of the house and of these women, was given on three several occasions during the term, to the plaintiff's agent, who promised to attend to it; that the defendant, whenever asked to pay his rent, refused to do so, unless these women were removed from the house; that the plaintiff took no notice of the request of the defendant, except to promise by his agent to get the women out, if it could be proved to him that they were of bad character, which the defendant undertook to do, if the agent would call at the house any evening, and named an evening; but the agent replied he had other business to attend to. No other notice than that

above mentioned was given to the plaintiff of these facts, but the policeman testified he made four attempts to find the plaintiff to inform him of the character of the house, and left word with a brother of the plaintiff that he wished to see the plaintiff in regard to it. The plaintiff testified he never received the message. Notice to quit was served by the plaintiff on the defendant, and the defendant left the premises two or three days before the notice expired, having, as he alleged, used all due diligence from the time he first discovered the character of the other occupants, to procure other suitable lodgings. It was in evidence that the business of the plaintiff in matters pertaining to his real estate was conducted by an agent.

The presiding judge ruled that the above facts, though proved, constituted no defence to the action. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. Willard and *C. H. Hurd*, for the defendant.

C. H. Drew, for the plaintiff.

ENDICOTT, J. It is well settled in this Commonwealth, that to constitute an eviction there must be either a physical ouster of the tenant by the landlord, or some act done by him on the premises with the intent of depriving the tenant of the enjoyment and occupation of the whole or part of the same to which the tenant yields the possession within a reasonable time, and in either case the rent is suspended. *Royce v. Guggenheim*, 106 Mass. 201. There was no physical ouster in this case. The only question is whether the evidence offered shows such acts on the part of the plaintiff and the defendant as will constitute an eviction under the above definition. It does not appear on the evidence that the plaintiff let the rooms, the use of which is complained of, with the intent to disturb the defendant in his use and occupation. On the contrary, the rooms were so occupied when the defendant's term began. Nor does it appear that the plaintiff at that time had any knowledge of the alleged use made of the rooms, nor that any proof of such use was at any time given him. Even if an intent to evict may be presumed, as argued by the defendant, from the neglect of the agent to ascertain the facts, when notice was given him, it does not appear when the notice was given, except that it was on three several occasions during the term, which was of eleven weeks' duration. The evidence also fails to show that the defendant was in fact deprived of the use and occupation of his demised premises; he continued in actual use and occupation of the whole, during the eleven weeks, and at last yielded to a notice to quit for non-payment of rent. No evidence was offered that would justify the jury in finding that any act was done by the plaintiff with the intent and effect of depriving the defendant of the use and occupation of the whole or part of the demised premises.

The case of *Dyett v. Pendleton*, 8 Cow. 727, is relied upon by the defendant. That has been called an extreme case; it has been modified, if not overruled, by later decisions in New York; and this court declined to rest its judgment upon it in *Royce v. Guggenheim*. But

that case was decided upon a very different state of facts, and contained many elements, necessary to constitute an eviction, which are wanting in the case at bar. The defendant there, under a lease for years, had been in more than a year, when the plaintiff, who occupied adjoining rooms under the same roof, himself created the disturbances and nuisances complained of, and the defendant within a month abandoned his tenement. The intent to evict, and actual abandonment, might well have been found; but to hold there was an eviction here, would be to go far beyond that decision.

There having been no eviction from the premises, but the defendant remaining in full occupation, we do not think there was any question for the jury, as to the beneficial value of the premises to the defendant; and it was immaterial whether he had used due diligence in endeavoring to obtain other lodgings. The cases cited by the defendant do not sustain this position. In one, the tenant was excluded from the occupation of a portion of his demised premises; in the other, access to the demised premises was closed, and the occupation thereby limited. *Cowie v. Goodwin*, 9 C. & P. 378. *Boston & Worcester Railroad v. Ripley*, 13 Allen, 421.

The doctrine of the recoupment of damages, as established in this Commonwealth, does not apply to this case.

*Exceptions overruled.*¹

GRABENHORST v. NICODEMUS.

COURT OF APPEALS OF MARYLAND. 1875.

[Reported 42 Md. 236.]

APPEAL from the Court of Common Pleas.

The appellees sued the appellant in the Circuit Court for Baltimore county, to recover the sum of \$1,000, as the consideration for the privilege given to him of purchasing a certain distillery and premises, within a time specified; and also the sum of \$125 per month rent for the same property. The case, on the suggestion and affidavit of the defendant, was removed to the Court of Common Pleas, where his pleas were filed.

First Exception. The plaintiffs to maintain the issue on their part offered in evidence a lease dated the 15th of February, 1871, whereby they leased to the defendant the distillery and premises described in a deed particularly referred to, for the term of one year, beginning on the day of the date of the lease and ending on the 14th of February, 1872, at the rent of \$125 per month, payable monthly on the first day of each month. It was agreed and understood that all repairs and improvements which the lessee might require, he should do at his own

¹ See accord. *Gilhooley v. Washington*, 4 Comst. 217.

expense, and that all repairs, improvements and fixtures and machinery which he should introduce into or put upon the distillery or premises should revert to, and become the property of, the lessors upon the termination of the lease, without cost to them.

The plaintiffs then proved by Charles G. Heim that the defendant entered into possession of the leased premises and remained in possession during the year mentioned in the lease, and had paid no rent therefor. They also offered in evidence an agreement between themselves and the defendant, dated the 15th of February, 1871, the execution of which was admitted, whereby the plaintiffs agreed that the defendant might during the year for which the property was leased, and not afterwards, purchase the same for \$5,000, provided the title was satisfactory; and the defendant agreed and bound himself to pay to the plaintiffs for the privilege, the sum of \$1,000, at the expiration of the year, if he did not purchase the property for the sum of \$5,000. If, however, he should complete the purchase within the year, then the \$1,000 was to be considered as included in the said purchase-money of \$5,000, and should not be required of him. It was also agreed, that if the defendant should complete the purchase, the rent should cease from the day when the sale should be completed, and the purchase-money fully settled.

The plaintiffs further proved by the witness Heim that the \$1,000 mentioned in the agreement had not been paid. On cross-examination this witness proved that the plaintiffs received \$5,000 from Mr. John W. Garrett for the property mentioned in the lease. On re-examination the witness proved that the money was paid on or about the 1st of March, 1873. The plaintiffs then offered in evidence an agreement dated the 16th of January, 1873, signed by themselves, certifying that they had sold the property to the defendant for \$5,000, provided he paid the sum of \$2,000 on or before the 1st of March, 1873, and gave satisfactory security for the balance. There was an indorsement on this paper extending the time of payment to the 7th of March, 1873.

The defendant then to maintain the issue on his part, offered in evidence an agreement made on the 16th of January, 1873, to sell to the defendant the distillery property, and that the plaintiffs did not waive any right to the amount of rent and privilege claimed by them to be due by the defendant under a prior agreement. The defendant then proved by himself that he sold the distillery property to Mr. Garrett for \$5,000, but did not receive the money, it was paid to the plaintiffs; he then offered to prove also by himself, subject to exception, that after the time named in the agreement, which gave him the privilege of purchasing the property, had expired, he went to see the plaintiffs and they agreed to extend the time for the purchase of the property by the witness, — they were anxious to sell the property, — and on the last of July, 1873, they told him they would sell the property to him under the agreement. The plaintiffs objected to this evidence, and the court (*Garey, J.*) sustained the objection; the defendant excepted.

Second Exception. The defendant then offered to prove by himself that at the time when the lease offered in evidence in this cause was executed, the distillery therein mentioned was not in running order; that he promised to repair it, and spent two or three thousand dollars in the repairing thereof; that after such repairs were made he was ready to run the distillery — the plaintiffs refused to sign the consent as owners of the fee which is required by the Internal Revenue Laws of the United States, before the defendant could procure the necessary papers to run the same as a distillery, and in consequence of such refusal he was prevented from running the same as a distillery, and the property therefore continued idle; that the defendant several times applied to the plaintiffs to sign such consent, but they refused so to do.

And also offered to prove by Robert G. King, that he is one of the Assistant Assessors of Internal Revenue for the District, in which is situated the distillery, formerly occupied by the defendant; that sometime in the year 1871 or 1872, the defendant applied to the assessor to furnish him with such papers as were required by law, to allow him to run the aforesaid distillery; that among such papers, was one, by which Jeremiah Nicodemus and others, the owners of the fee, were required to give their consent to the use of the property for distilling purposes, which was never executed by them, and thereupon the necessary papers were never delivered to the defendant.

To the evidence so offered by the defendant, the plaintiffs objected, and the court sustained the objection. The defendant thereupon excepted.

Third Exception. The plaintiffs offered the following prayers: —

1. If the jury shall find the execution by the plaintiffs and defendant of the lease, dated 15th of February, 1871, offered in evidence, and that the defendant entered into possession under the same, and that no part of the rent mentioned in said lease has been paid, then the plaintiffs are entitled to recover the rent therein stipulated, together with interest upon each sum of \$125, from the time when it was payable.

2. If the jury find the execution by the plaintiffs and defendant of the agreement, dated the 15th of February, 1871, and that the defendant did not purchase the property therein mentioned at any time during the period of one year thereafter, and that he has not paid the sum of one thousand dollars, then the plaintiffs are entitled to recover the said sum of \$1,000, together with interest thereon from the 16th of February, 1872.

The defendant offered six prayers, which need not be reported. The court granted the prayers of the plaintiffs, and refused those of the defendant. To this ruling of the court the defendant excepted, and the verdict and judgment being for the plaintiffs, he appealed.

The cause was argued before BARTOL, C. J., STEWART, GRASON, MILLER, and ALVEY, JJ.

Fred. C. Cook and *Samuel Snowden*, for the appellant.

D. S. Briscoe and *William A. Fisher*, for the appellees.

STEWART, J., delivered the opinion of the court.

There are two agreements between the parties involved in the case. The one being the lease of the distillery and premises, at a specified rent; and the other, in regard to the offer to sell the same property, under which plaintiffs claim one thousand dollars for the privilege given to defendant to purchase the property within twelve months.

Three exceptions were taken by the defendant to the rulings of the court. The first and second of which raise questions as to the admissibility of testimony, and the third excepting to the granting of plaintiffs' two prayers; and the rejection of the six prayers of the defendant.

The contract between the parties in regard to the claim of the plaintiffs of one thousand dollars, is a distinct agreement for the payment of that sum, for the privilege of purchasing the property; and involves no question of penalty or liquidated damages for its non-performance.

It is not a bargain and sale of the property at \$5,000, but a proposition and obligation on the part of the plaintiffs, to sell it to the defendant at that price with the privilege to him to make the purchase or not, as he may determine within the year.

For this option, which was a valuable privilege, he agrees to pay the \$1,000 in the event of his declining to make the purchase.

The defendant acquired the right under the contract, to purchase the property for the proposed price.

The plaintiffs had obligated themselves to sell at that price; but the defendant was under no obligation to buy. He merely bound himself to pay the \$1,000 for the privilege of buying, and in case he did not buy. It was entirely optional with the defendant to purchase the property or let it alone; whilst the plaintiffs had abandoned the right to make sale to any one else during the year.

That was a sufficient consideration for the defendant's obligation. This we understand, to be the nature of the contract between the parties as to this particular. There is no ground for the theory, that the contract imported a bargain and sale of the property, obligatory as such upon the parties; and that the thousand dollars was provided as the penalty for its enforcement upon the defendant.

Such construction would make a different contract for the parties, from what they have stipulated.

We find no error in the exclusion of the parol proof, offered by the defendant in his first exception.

Such testimony was clearly inadmissible, in the face of the written agreements of 16th January and 25th February, 1873, introduced as evidence by the defendant himself.

In the absence of these agreements, whether the proposed testimony might be adduced to prove waiver, or extension of the time, for performance of the original agreement, notwithstanding the Statute of Frauds requiring the contract as to the sale of lands to be in writing; or the rule of the common law disallowing parol testimony, to contra-

dict, add to, or vary the terms of the written contract, it is unnecessary to decide.

There was error in the refusal of the testimony offered by the defendant in the second exception.

The plaintiffs had rented to the defendant the distillery and premises for one year, at \$125 per month.

According to the terms and provisions of the lease between the parties, the property was rented to be used and employed by the defendant as a distillery; the defendant was to repair and improve the property, as he might desire at his own expense, but all such improvements, fixtures, and machinery put upon the distillery or premises rented, to become the property of the plaintiffs at the termination of the lease, without cost to them.

The distillery could not be run and conducted by the defendant except in compliance with the Revenue Laws of the United States, applicable thereto.

This the parties must be presumed to have known. The plaintiffs, having made the lease to the defendant for such purpose, must be considered as having entered into such contract subject to the provisions of the laws regulating that pursuit; and the contract between the parties is affected thereby.

Under the Internal Revenue Acts of Congress (see Revised Statutes, title 35, § 3262), the bond of the defendant as a distiller, renting and not owning the property in fee, was not authorized to be approved, and he could not lawfully carry on the distillery, unless he filed with the collector the written consent of the plaintiffs as the owners of the property in fee.

The plaintiffs having rented their property for such purpose, if they refused to give their consent in writing to the defendant, as required by the law, preliminary to the use of the distillery, it would be unjust towards the defendant for them to undertake to exact rent for the premises, if they had failed to supply him with the necessary legal muniment to enable him to carry on the business.

It is not to be intended that they designed that the defendant should make use of the distillery in violation of the law. The default of the plaintiffs in that particular would amount to "constructive eviction," to all intents and purposes, so far as the legitimate employment of the property is concerned. Taylor's Landlord and Tenant, § 380.

The obligation of the plaintiffs to give their consent as demanded by the law, must be implied as a necessary incident to the lease in question, as fully as if there had been a positive stipulation to that effect.

Although there was no express covenant for the legal employment of the property leased, as a distillery, it is a necessary implication from the circumstances and nature of the lease.

The payment of the rent is to be taken as the equivalent and consideration for the beneficial enjoyment of the premises as a distillery, so

far as such consent could contribute to that result; and the lessors had no right to withhold it, and yet expect to be paid the stipulated rent; such act on their part was indispensable to the consummation of the lease between the parties.

They were as much bound, as the owners of the fee of the property, to give their written consent, as to allow the tenant to take possession of the distillery and premises, which, although not mentioned, was an implied covenant affecting the lease.

This contract, like any other, must be expounded to give effect to the intention of the parties, according to the reasonable import of the terms of the instrument, the circumstances affecting it, the character of the property, the purposes for which it was leased, and the employment to which it was to be devoted.

The mutual obligations of the parties growing out of the contract, must be understood and defined with reference to all these considerations.

Where there are no express stipulations upon the subject, such facts furnish sufficient evidence, from which the agreement may be inferred between the parties, quite as controlling as positive stipulations.

Without the written consent of the lessors the lease of the property as a distillery would be a nugatory and incomplete act. See Taylor's Landlord and Tenant, §§ 244-245-247-252.

The lessors having instituted the action for the recovery of the rent, the tenant has the right to recoup damages for any breach or non-performance of duty on their part, to the extent of the rent. Taylor's Landlord and Tenant, §§ 317-374-378.

Such being the view we take of the contract between the parties, and the rulings of the court below, in the first and second exceptions, there was error in the third exception, in the granting of the plaintiffs' first prayer, but their second prayer was properly granted, and the defendant's prayers refused.

Judgment reversed, and new trial ordered.

(Decided 14th April, 1875.)

A motion for a rehearing of the foregoing case was made by the appellees on the 23d of April, 1875. This motion the court overruled, and at the same time filed the following opinion:—

BARTOL, C. J. The motion for a rehearing of this cause having been considered, it is hereby ordered that the same be overruled.

Upon a careful examination of the Acts of Congress to which we have been referred, we find no error in the opinion heretofore filed. The general expression therein, that the appellant "could not lawfully carry on the distillery, unless he filed with the collector the written consent of the plaintiffs as the owners of the property in fee, &c.," is substantially correct; for though the Act provides a mode by which the distillery might have been carried on, without the written consent of

the appellees, yet this provision did not secure to him an absolute right which he could have exercised; but it was made entirely dependent upon the will and discretion of the Commissioner.

Motion overruled.

(Decided 24th June, 1875.)

BEAL v. BOSTON CAR SPRING COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[Reported 125 Mass. 157.]

CONTRACT for rent due under a written lease made by Heyer Brothers to the defendant for the term of five years from April 1, 1874, and by Heyer Brothers assigned to the plaintiff.

At the trial in the Superior Court, before *Allen, J.*, it appeared in evidence that the premises described in the lease of Heyer Brothers to the defendant constituted a part of the same premises which Heyer Brothers held under and by virtue of a lease to them for a term of ten years from April 1, 1874, made by the plaintiff, who was the owner of the premises; that on February 7, 1877, when the plaintiff received the assignment from Heyer Brothers of their lease to the defendant, he executed upon the back of the original lease from himself to Heyer Brothers the following instrument: "Boston, February 7, 1877. The within-named lessor, in consideration of the assignment to him of certain underleases made by the within-named lessees of parts of the premises demised in the within lease, and of one dollar to him paid by the within-named lessees, doth hereby release and forever discharge the said lessees, their heirs, executors, and administrators, of and from all claims, demands, and causes of action of and concerning the within lease, and especially all claims by him for rent thereunder; and said lessees do hereby surrender and yield up the said lease and the premises within described to said lessor, and such surrender is hereby accepted by him, but without prejudice to the leases of parts of the premises assigned to him as above mentioned." It further appeared that the terms of this instrument were carried out, and that Heyer Brothers ceased to occupy the premises.

The defendant offered to show that it had not been in the occupation of the premises since February 7. This evidence was objected to as being immaterial, and was excluded.

The defendant contended and asked the judge to rule that if, by the arrangement entered into between the plaintiff and Heyer Brothers, the original lease was on February 7, 1877, given up, discharged or vacated, and the tenancy of Heyer Brothers thereupon ceased, and the plaintiff resumed control of the premises, and Heyer Brothers at the same time assigned and transferred to the plaintiff the underlease before then held

by the defendant from them; and if the defendant, when informed of this, ceased to have anything further to do with the premises, and refused to recognize as longer subsisting or continuing in force the underlease given to them by Heyer Brothers, or to become liable to the plaintiff as assignee thereof in any way, the plaintiff could not maintain his action.

The judge refused so to rule, but ruled that the plaintiff was entitled to recover; and directed the jury to return a verdict for the plaintiff. The defendant alleged exceptions.

F. A. Brooks and A. S. Hall, for the defendant.

E. W. Hutchins, for the plaintiff.

ENDICOTT, J. The plaintiff, being the owner of the estate, leased the same for the term of ten years to Heyer Brothers; and they, on the same day, leased a part of the premises to the defendant for a term of five years. It is to be inferred from the subsequent agreement between the plaintiff and Heyer Brothers that other underleases were made. Before the expiration of the underlease to the defendant, Heyer Brothers assigned it to the plaintiff; who at the same time indorsed on the original lease to Heyer Brothers an agreement releasing them from rent and accepting the surrender of their lease and the premises, "but without prejudice to the leases of parts of the premises assigned to him." This agreement was made in consideration of the assignment to the plaintiff of the underleases by Heyer Brothers.

The intention of the parties is plain. Heyer Brothers having made underleases of parts of the premises which the plaintiff was willing to take, and desiring also to surrender the reversion in these leases to the plaintiff, which he was willing to accept, the underleases were assigned, including the defendant's, and the surrender of the original lease accepted without prejudice to the underleases. They evidently did not intend that the rights of the plaintiff under the assignment, or the estates of the sub-lessees, should be destroyed by the surrender, for the language of the acceptance carefully provides for both. The purpose was to put the plaintiff precisely in the position of Heyer Brothers. This intention, as expressed in the papers they have executed, will be carried out, if consistent with the rules of law, and we are of opinion that it is.

The plaintiff brings this action, as assignee of the lease, to recover upon the defendant's covenant to pay rent; and it is well settled that when a lease is assigned without the reversion, the privity of contract is transferred, and the assignee may sue in his own name for the rent accruing after the assignment. *Kendall v. Carland*, 5 Cush. 74; *Hunt v. Thompson*, 2 Allen, 341. The only objection suggested to the plaintiff's right to recover is the surrender of the lease of Heyer Brothers to the plaintiff; and the claim is, that the rent due from the defendant is an incident of the reversion in Heyer Brothers, and, the reversion having been extinguished by the surrender, all remedies incident to it are taken away. But rent is not necessarily an incident to

the reversion, so that it cannot by the acts or agreements of the parties be separated from it. In a general grant of the reversion, the rent will pass as incident to it. *Burden v. Thayer*, 3 Met. 76. But the reversion may be granted and the rent reserved, or the rent may be assigned, reserving the reversion, if such is the intention of the parties as expressed in the words they use. Lord Coke says that fealty is an incident inseparably annexed to the reversion, and the donor or lessor cannot grant the reversion and save to himself the fealty; but the rent he may except, because the rent, though it be an incident, yet is not inseparably incident. Co. Lit. 143 a, 151 b; 3 Cruise Dig. 337; *Demarest v. Willard*, 8 Cow. 206. Heyer Brothers therefore could have granted their reversion, or surrendered it to the plaintiff and reserved the rent accruing upon the underleases. In such a case, their relations to the sub-lessees would not be changed by the grant or surrender of the reversion, and they could have recovered rent of this defendant upon the covenants of its lease. Having that estate reserved in the premises, they could have assigned it to a third party or to the plaintiff, and the assignment would have been good, and the defendant would have been bound to pay to the assignee rent for the estate held under its lease. This form of proceeding was not adopted by the parties, but the same result was accomplished. As the assignments were simultaneous with the surrender, Heyer Brothers did not in terms reserve the rent to themselves, but the plaintiff accepted the surrender in consideration of the assignment, with the express stipulation that it should not prejudice the underleases assigned to him; that is, should not invalidate the assignment, or affect the rights of the parties holding the leases.

The case is not presented, what would be the rights of Heyer Brothers against this defendant; or what would be the rights of the plaintiff, if he had not taken an assignment of the underleases, and had accepted a surrender without qualification. The two cases of *Grundin v. Carter*, 99 Mass. 15, and *Webb v. Russell*, 3 T. R. 893, relied on in support of the proposition of the defendant, have no application to the facts here presented.

Exceptions overruled.

HOEVELER v. FLEMING.

SUPREME COURT OF PENNSYLVANIA. 1879.

[Reported 91 Pa. 322.]

BEFORE SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKY, and STERRETT, JJ. GREEN, J., absent.

Error to the Court of Common Pleas, No. 1, of Allegheny county : Of October and November Term, 1879, No. 146.

Debt by Elizabeth Hoeveler against William Fleming & Co., to recover a quarter's rent.

In April, 1873, the plaintiff demised to the defendants for the term of five years, the rent payable quarterly, a building in the city of Pittsburgh. The lease contained the usual covenants. The defendants agreed that they would make all alterations and repairs at their own cost, except such ordinary repairs as would make the building tenantable. They also covenanted to deliver up the premises at the end of their time in good and sufficient repair, "reasonable wear and tear and accidents by fire excepted." In March, 1877, the premises were so injured by fire that they were untenable, and defendants vacated them. The insurance company in which the property was insured, with the assent of the plaintiff and without objection from defendants, employed a contractor to make the repairs, and the key was delivered to him. On account of these repairs the building was not in a condition for occupancy until August, 1877, when the defendants declining to again occupy the premises, and refusing to pay the rent for the quarter during which the repairs were being made, this action was brought to recover it.

At the trial before *Collier, J.*, the plaintiff asked the court to charge that the evidence was not sufficient to warrant the jury in finding an eviction; that when the insurance company, with the assent of the plaintiff and without objection from defendants, proceeded to repair, the rent was not thereby suspended, and that even if plaintiff had ordered the repairs, the defendants would not be released; all of which the court refused.

The defendants submitted the following point, to which is appended the answer of the court:—

If the plaintiff, under the provisions of her contract of insurance, directed the insurance companies to proceed to rebuild or repair the premises, and the insurance companies did so proceed and occupy the premises during the three months for which suit is brought, the plaintiff is estopped from recovery in this action.

Ans. "Affirmed, if you believe the entry by the contractor was

without the consent of defendants, and that the repairs made were more than the usual, ordinary, and necessary repairs."

Verdict for defendants, when plaintiff took this writ and alleged that the court erred in charging as above.

H. and G. C. Burgwin, for plaintiff in error.

J. Erastus McKelvy and *Thomas M. Marshall*, for defendants in error.

MR. JUSTICE PAXSON delivered the opinion of the court, November 3, 1879.

It is settled by a current of authority that an eviction of a tenant by the landlord of demised premises suspends the rent. The reason of this rule is well stated by Baron Gilbert in his Treatise on Rents, at page 145: "A rent is something given by way of retribution to the lessor, for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded upon this: that the land demised is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for a thing he has not. If, therefore, the tenant be deprived of the thing letten, the obligation to pay rent ceases, because such obligation has its force only from the consideration, which was the enjoyment of the thing demised."

The modern doctrine as to what constitutes an eviction is, that actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the demised premises will amount to an eviction in law. Thus in *Doran v. Chase*, 2 W. N. C. 609, this court affirmed the ruling of the court below, that "A landlord's refusal to allow an under-tenant to enter the premises, under threats of suit, whereby the lessee is deprived of underletting, is such an interruption of the latter's rights as amounts to an eviction." So an eviction of the lessee from any part of the demised premises will suspend accruing rent. *Linton v. Hart*, 1 Casey, 193. If the landlord claim and use certain privileges upon the demised premises, against the tenant's consent, he must show a reservation of them, or the rent is suspended. *Vaughan v. Blanchard*, 4 Dall. 124. And I apprehend there might be a legal eviction by confining the tenant to the demised premises, as by closing up a way which was his only means of egress and ingress. Any act of the landlord which deprives the tenant of that beneficial enjoyment of the premises to which he is entitled under the lease, will amount in law to an eviction and suspend the rent.

How far the entry of the landlord to make repairs will work an eviction must depend, to some extent, upon the circumstances of each particular case. When the landlord is bound by the lease to make repairs, and the repairs are merely such as are required by ordinary wear and tear, no difficulty is likely to arise. And where he is not bound to do so, but makes them for the benefit of the property and the convenience of the tenant, the dangers of a contest are equally remote, as tenants are more willing, as a general rule, to have the property put in order than landlords are to incur the expenditure. In *Pier v. Carr*, 19 P. F.

Smith, 326, where the tenant had been sold out by a constable, under a warrant for taxes, and after the sale, the constable had delivered the key to the landlord, who put a bill "To Let" upon the premises, and proceeded to have some slight repairs made, it was held there was no eviction.

Where, however, the repairs are not ordinary, but are of a character to deprive the tenant of all beneficial enjoyment of the premises, or at least seriously interrupt it while the repairs are in progress, we have a question presented of a different character. The case in hand comes within this class. The lease from the plaintiff to the defendant was in the usual form, with the ordinary covenants for the payment of rent. The tenants were to deliver up the possession at the end of the term, "in good and sufficient repair as when received, reasonable wear and tear and accidents by fire excepted." The tenants were to have the right to make certain specified alterations, with the stipulation that all alterations and repairs were to be made at their own cost, "excepting such ordinary repairs as will make the house tenantable." During the term the demised premises were partially destroyed by fire. The third story was burned, and a considerable portion of the second story. It was conceded the fire rendered the premises untenable, and that defendants moved out. The plaintiff had an insurance upon the building and refused the settlement offered by the insurance company. Thereupon the company took possession for the purpose of rebuilding, and through their contractor retained the possession from some time in April until about the middle of August. The repairs were necessarily extensive; a division wall between the demised premises and the adjoining building, belonging to the plaintiff, was so far injured as to require it to be taken down and rebuilt. The plaintiff was upon the premises from time to time, and gave directions as to the repairs. The present action was for a quarter's rent, during the progress of the repairs.

There is no evidence that the defendants assented to the occupation of the premises for the purpose of rebuilding. It is clear that by the terms of the lease the defendants were not obliged to rebuild. Accidents by fire were expressly excepted. And I have as little doubt they would have been responsible for the rent during the term if the plaintiff had been content to let the building stand roofless and scarred by fire during that period. The lease contained no exoneration from the rent in case of fire. But the plaintiff, or the insurance company for her, proceeded to rebuild, — wisely perhaps, as the injury to the dismantled building from the storms would have been greater than any probable loss of rent. Having proceeded to rebuild, for her own interests quite as much as for the convenience of the tenants, and having thereby taken the possession of the demised premises to their entire exclusion, without request or even assent on their part, can she hold them for the rent? In the somewhat quaint language of Baron Gilbert, "The tenant can make no return for the thing he has not." In *Magaw v. Lambert*, 3 Barr, 444, it was held that "if a landlord take possession of the ruins

of his premises destroyed by fire for the purpose of rebuilding, without the consent of his tenant, it is an eviction; if with his assent, it is a rescission of the lease, and in either case the rent is suspended." I am unable to see any substantial distinction between that case and the one in hand. It is true there was a total destruction of the property in *Magaw v. Lambert*, and only a partial destruction here. But the partial destruction was so great that the tenant had to move. A total destruction could have done no more. But it is said here that the landlord was bound to repair. I do not so understand it. Aside from the lease, there was no duty upon her to do so, and the lease did not impose any. In no part of it does the plaintiff covenant to repair. The most that can be gathered from it is an implication that the defendants were to be allowed the cost of ordinary repairs if they saw proper to make them. Certainly all other repairs and alterations were to be at their own expense. We are of opinion that *Magaw v. Lambert* rules this case.

Judgment affirmed.



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